83-1190

NO. 83-

Office - Supreme Court, U.S.
FILED
JAN 20 1984
ALEXANDER L. STEVAS,
CLERK

In The
Supreme Court of the United States
October Term, 1983

ATHENS LUMBER COMPANY, INCORPORATED,
AND
JOHN P. BONDURANT,

Appellants,

vs.

FEDERAL ELECTION COMMISSION, et al.,

Appellees.

On Appeal from
The United States Court of Appeals
For the Eleventh Circuit

JURISDICTIONAL STATEMENT

EMMET J. BONDURANT
JEFFREY O. BRAMLETT
Attorneys for Athens Lumber Company, Incorporated, and John P. Bondurant
BONDURANT, MILLER, HISHON & STEPHENSON
2200 First Atlanta Tower
Two Peachtree Street, N.W.
Atlanta, Georgia 30383-4501
(404) 581-5200

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTIONS PRESENTED

1. Whether the ban on corporate political expenditures in federal elections of 2 U.S.C. § 441b(a) violates the First Amendment because it (a) deprives voters of their right to hear all points of view concerning the qualifications of candidates based solely on the corporate source of the information, (b) prohibits corporate expenditures for the publication of information concerning candidates for President or Congress without regard to the truthfulness or relevancy of the information, and (c) discriminates by prohibiting political speech by appellants and other non-media corporations while permitting media corporations, partnerships, other organized groups, and individuals to make unlimited expenditures for political advocacy.

2. Whether the ban on political contributions by corporations to candidates for President or Congress, regardless of amount, imposed by 2 U.S.C. § 441b(a) is overbroad and discriminatory in view of the fact that Congress has expressly authorized partnerships, other business and non-business organizations, and individuals to contribute $1,000 per year to such candidates.

3. Whether 2 U.S.C. § 441b(a) which prohibits contributions and expenditures by corporations if made "in connection with" federal elections is unconstitutionally vague under the First and Fifth Amendments.

4. Whether Athens Lumber Company has standing to join its president and shareholder, who is also a qualified voter, in challenging the constitutionality of 2 U.S.C. § 441b(a) under the expedited review provisions of 2 U.S.C. § 437h.

INTERESTED PARTIES

Pursuant to Supreme Court Rule 15.1(b), the following list identifies all parties to this case:

Athens Lumber Company, Incorporated

John P. Bondurant

Federal Election Commission

William French Smith, in his official capacity as Attorney General of the United States

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INTERESTED PARTIES	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION AND STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
THE QUESTIONS ARE SUBSTANTIAL	8
I. The Constitutionality of the Ban on Corporate Expenditures and Contributions has Never been Ruled Upon by this Court.	8
II. The Statute Deprives the Electorate of Potentially Relevant Political Information from Corporate Sources.	10
III. The Issues are Not Controlled by *National Right to Work Committee.*	13
IV. The Statute is Unconstitutional under the First Amendment and Prior Decisions of this Court.	14
A. The Ban on Expenditures	14
B. The Ban on Contributions	19
C. Vagueness	21
CONCLUSION	24

APPENDICES

Athens Lumber Co. v. Federal Election Commission, 718 F.2d 363 (11th Cir. 1983) (*en banc*) ——— App. A

Athens Lumber Co. v. Federal Election Commission, 689 F.2d 1006 (11th Cir. 1982) ——— App. B

TABLE OF CONTENTS—Continued

Page

Athens Lumber Co., Inc. v. Federal Election Commission, 531 F.Supp. 756 (M.D. Ga. 1982) ..... App. C

Judgment of October 24, 1983 ..... App. D

Notice of Appeal filed October 28, 1983 ..... App. E

Unanimous Resolution of Shareholders of Athens Lumber Company ..... App. F

TABLE OF AUTHORITIES

CASES

Athens Lumber Co. v. Federal Election Commission, 718 F.2d 363 (11th Cir. 1983) (*en banc*) 1

Athens Lumber Co. v. Federal Election Commission, 689 F.2d 1006 (11th Cir. 1982) 1

Athens Lumber Co., Inc. v. Federal Election Commission, 531 F. Supp. 756 (M.D. Ga. 1982) 2, 5

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 12

Bellis v. United States, 417 U.S. 85 (1974) 18

Brown x. Hartlage, 456 U.S. 45 (1982) 16

Buckley v. Valeo, 424 U.S. 1 (1976) 10, 14, 15, 19, 23

California Medical Ass'n v. FEC, 453 U.S. 182 (1981) 2

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980) 12, 14, 16, 17

Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981) 10, 13

TABLE OF AUTHORITIES—Continued

Page

Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980) 10, 14, 16, 17, 18

Democratic Party of the United States v. National Conservative Political Action Committee, — F. Supp. — (E.D. Pa., Dec. 12, 1983) 14

Elrod v. Burns, 427 U.S. 347 (1976) 13

FEC v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45 (2d Cir. 1980) 16, 17, 24

FEC v. National Right to Work Committee, — U.S. —, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982) 8, 13, 14

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 10, 11, 12, 13, 14, 17, 18, 23

Grosjean v. American Press Co., 297 U.S. 233 (1936) 13

Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) 21

Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977) 17

Metromedia, Inc. v. San Diego, 435 U.S. 490 (1981) 20

Mills v. Alabama, 384 U.S. 214 (1966) 17

Near v. Minnesota, 283 U.S. 697 (1931) 9

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 16

Police Department of City of Chicago v. Mosley, 408 U.S. 92 (1972) 18

Stromberg v. California, 283 U.S. 359 (1931) 9

TABLE OF AUTHORITIES—Continued

Page

Thornhill v. Alabama,
310 U.S. 88 (1940) 16

United States v. UAW-CIO,
352 U.S. 567 (1957) 10, 12

United States v. C.I.O.,
335 U.S. 106 (1948) 8, 9, 11, 15, 21

United States v. Grace,
— U.S. —, 75 L.Ed.2d 736 (1983) 14

United States v. Lewis Foods Co.,
236 F. Supp. 849 (S.D. Cal. 1964),
rev'd, 366 F.2d 710 (9th Cir. 1966) 16, 17

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,
425 U.S. 748 (1976) 12

STATUTES

Federal Election Campaign Act

2 U.S.C. § 431(9)(B)(i) 6
§ 437g 5
§ 437h 3, 5
§ 437h(a) 2
§ 437h(b) 2, 5, 6
§ 441b(a) 2, 3, 4, 5, 6, 7, 9, 10, 14, 19, 23, 24
§ 441b(b)(4)(C) 13
§ 608(b) 20
§ 608(e)(1) 22
18 U.S.C. § 610 9
28 U.S.C. § 2101(c) 2

TABLE OF AUTHORITIES—Continued

Page

MISCELLANEOUS

H.R. Doc. No. 334, 80th Cong. 1st Sess. 9 9

The Year of the Accountant, *N.Y. Times* Jan. 3, 1982 18

U.S. Bureau of Census, *Statistical Abstract of the United States*, 1982-83 (Table 899) (103d ed.) 18

NO. 83-

In The

Supreme Court of the United States

October Term, 1983

ATHENS LUMBER COMPANY, INCORPORATED,
AND
JOHN P. BONDURANT,

Appellants,

vs.

FEDERAL ELECTION COMMISSION, et al.,

Appellees.

On Appeal from
The United States Court of Appeals
For the Eleventh Circuit

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Eleventh Circuit opinions from which this appeal is taken, *Athens Lumber Co. v. Federal Election Commission*, 718 F.2d 363 (11th Cir. 1983) (*en banc*), and *Athens Lumber Co. v. Federal Election Commission*, 689 F.2d 1006 (11th Cir. 1982), are reproduced as Appendices A and B, respectively. The opinion of the district court is re-

ported as *Athens Lumber Co., Inc. v. Federal Election Commission*, 531 F. Supp. 756 (M.D. Ga. 1982), and is reproduced in Appendix C.

JURISDICTION

This is a declaratory judgment action brought by a qualified voter and a corporation under the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 437h(a), to construe the constitutionality of 2 U.S.C. § 441b(a) prohibiting corporate contributions or expenditures "in connection with" federal elections.

On October 24, 1983, the Eleventh Circuit Court of Appeals *en banc* entered a final judgment upholding the constitutionality of § 441b(a). The final judgment below is reproduced as Appendix D.

A timely notice of appeal was filed by the appellants from the decision below in the United States Court of Appeals for the Eleventh Circuit on October 28, 1983. The notice of appeal is reproduced as Appendix E.

Jurisdiction to review this decision of the United States Court of Appeals for the Eleventh Circuit by direct appeal is conferred upon this Court by 2 U.S.C. § 437h(b). *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981); *Buckley v. Valeo*, 424 U.S. 1, 6-12 (1976).

In the alternative, this Court has jurisdiction to review the decision below by writ of certiorari under 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The challenged Federal Election Campaign Act provision, 2 U.S.C. § 441b(a), provides:

> "(a) It is unlawful . . . for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices or for any candidate, political committee, . . . or any officer or any director of any corporation or of any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section."

STATEMENT OF THE CASE

John Bondurant, in his capacity as a registered voter and as president of Athens Lumber Company, and the corporation brought a declaratory judgment action under the expedited review provisions of the Federal Election Campaign Act (2 U.S.C. § 437h) challenging the constitu-

tionality of the ban on corporate political "expenditures" and "contributions" in connection with federal elections. 2 U.S.C. § 441b(a). The complaint alleged that the statute was invalid under the First Amendment on eight specific grounds and sought to enjoin its enforcement against proposed "expenditures" and "contributions" of corporate funds of Athens Lumber Company authorized by a unanimous resolution of its shareholders.

Athens Lumber Company is a small closely-held Georgia corporation engaged in the manufacture and sale of architectural millwork, lumber and building materials in Athens, Georgia. All of the stock in the Company is owned by John Bondurant and five members of his immediate family. Mr. Bondurant is the president and chief executive officer of the corporation, and is also a registered voter duly qualified to vote in federal elections.

On July 23, 1981, the stockholders of Athens Lumber Company *unanimously* adopted a shareholders' resolution reproduced in Appendix F. The resolution cited the pervasive influence of the federal government over the economy in general, and the housing market in particular, and the effects of federal economic and other policies on the Company's business, customers and suppliers. The resolution authorized the expenditure of $10,000 in corporate funds in connection with federal elections held prior to December 31, 1984.

The shareholders voted to require that at least half of the fund be used for independent political "expenditures" (*i.e.*, newspaper, radio or television advertisements, bill inserts to customers or mailings to suppliers) advocating the election or defeat of specific candidates for

federal office. The shareholders voted to use the remainder of the fund for "contributions" of not more than $100 each in the name of the corporation, directly to candidates for federal offices, whose positions on economic issues the corporation favored.

These proposed "expenditures" of corporate funds for independent political advertising, and the "contribution" of corporate funds to candidates for federal offices, would, as the resolution acknowledged, violate the Federal Election Campaign Act, 2 U.S.C. § 441b(a), and could expose the corporation, Mr. Bondurant, and other consenting directors to severe civil and criminal penalties. 2 U.S.C. § 437g. The shareholders directed that a declaratory judgment be filed by Athens Lumber Company and its president under the expedited review provision of the Federal Election Campaign Act to determine the validity of the Act as applied to the corporation's proposed political activities. 2 U.S.C. § 437h.

The district court refused to certify the constitutional issues to the court of appeals as required by 2 U.S.C. § 437h(b), and dismissed the complaint on the ground that both the corporation and Mr. Bondurant lacked standing under Article III. *Athens Lumber Company v. FEC*, 531 F. Supp. 756 (M.D. Ga. 1982).

This decision was reversed by a panel of the Eleventh Circuit as to Mr. Bondurant (but not as to the Company), which certified eight constitutional issues to the full Elev-

enth Circuit for expedited *en banc* review as required by 2 U.S.C. § 437h(b).[1]

---

[1] The constitutional issues certified were as follows:

The "Expenditures" Issues

(1) Whether 2 U.S.C. § 441b(a) violates the First Amendment because it prohibits the expenditure of corporate funds to publish or communicate to the electorate truthful statements concerning the qualifications of specifically named candidates for election to federal offices.

(2) Whether 2 U.S.C. § 441b(a) is invalid under the First Amendment because it deprives the individual plaintiff, as a qualified voter, of his right to hear all points of view regarding the qualifications of candidates for federal office, including the views of corporations, national banks and labor unions.

(3) Whether 2 U.S.C. § 441b(a) violates the First Amendment because it prohibits the plaintiffs from spending corporate funds, independent of the campaign of any candidate and regardless of amount, for newspaper, radio or television advertising to advocate the election or defeat of a specifically identified candidate for federal office.

(4) Whether 2 U.S.C. § 441b(a) violates the First Amendment because it prohibits the plaintiffs from spending corporate funds, independent of the campaign of any candidate and regardless of amount, to distribute letters advocating the election or defeat of specifically identified candidates for federal office to be included as inserts in the monthly bills mailed by the corporate plaintiff to its customers and suppliers, or in other mailings made at the expense of the corporate plaintiff.

The "Contributions" Issue

(5) Whether 2 U.S.C. § 441b(a) violates the First Amendment because it prohibits the plaintiffs from making any direct political *contributions* from corporate funds of the Athens Lumber Company, Incorporated, to candidates for federal office.

The Discrimination - Overbreadth Issues

(6) Whether the provisions of 2 U.S.C. § 441b(a), together with the provisions of 2 U.S.C. § 431(9)(B)(i), discriminate ar-

(Continued on following page)

On October 24, 1983, the full Eleventh Circuit adopted the ruling of the panel on the issue of standing, but in a single sentence held that the eight constitutional issues raised by the appellants were "controlled by the [Su-

---

(Continued from previous page)

bitrarily and unreasonably in violation of the First and Fifth Amendments between corporations engaged in businesses other than publication of newspapers and magazines, on the one hand, and corporations engaged in the publication of newspapers and magazines, on the other hand, by prohibiting corporations in the former category from making any contributions or expenditures in connection with any elections to federal office, while expressly permitting corporations that publish newspapers and magazines to make "expenditures" of corporate funds to endorse, publicize the views of, and advocate the election and defeat of specifically identified candidates for public office.

(7) Whether the provisions of 2 U.S.C. § 441b(a) discriminate arbitrarily and unreasonably in violation of the First and Fifth Amendments between corporations, labor unions, and national banks, on the one hand, and natural persons and other organizations, on the other, by:

(a) Absolutely prohibiting the plaintiff corporation from making a contribution of money, in any amount, directly to a candidate for federal office or their campaign, while permitting natural persons and other organizations to give up to $1,000 directly to candidates for federal office or to their campaigns; and

(b) Absolutely prohibiting the plaintiff corporation from spending corporate funds, in any amount, independent of the campaign of a candidate for federal office, while permitting natural persons and other organizations to spend unlimited amounts to promote the election or defeat of specifically identified candidates.

Vagueness

(8) Whether the provisions of 2 U.S.C. § 441b(a), which threaten criminal sanctions for contributions or expenditures by the plaintiff corporation "in connection with" federal elections, are unconstitutionally *vague* under the First and Fifth Amendments.

preme] Court's unanimous opinion in *Federal Election Commission v. National Right to Work Committee, et al.*, — U.S. —, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982), and for the reasons there stated, we find the limitations and prohibitions of which appellants complain to be constitutional." 718 F.2d at 363.

———o———

THE QUESTIONS ARE SUBSTANTIAL

I.

The Constitutionality of the Ban on Corporate Expenditures and Contributions Has Never Been Ruled Upon by this Court

This Court has never directly ruled upon the constitutionality of the ban on corporate "expenditures" and "contributions" in federal elections, which has been aptly described by Justice Rutledge as "a bludgeon ill-designed for curbing the evils said to justify its enactment . . . ." *United States v. C.I.O.*, 335 U.S. 106, 153 (1948) (concurring opinion).

The ban on corporate political "contributions" was enacted in the Tillman Act of 1907, and was amended several times before being incorporated as a part of the Federal Corrupt Practices Act in 1925.

The legislative history of the Tillman and Federal Corrupt Practices Acts reflects no awareness on the part of Congress of the relevance of the First Amendment to prohibitions of corporation political activity. This is not surprising, since these enactments not only predate the

Court's recent concern with First Amendment rights of corporations, but also predate all of this Court's cases invalidating legislation under the First Amendment. *Stromberg v. California*, 283 U.S. 359 (1931); *Near v. Minnesota*, 283 U.S. 697 (1931). In 1947, the Taft-Hartley Act added the ban on "expenditures" by corporations, and also extended the ban to unions. In 1976, the prohibitions on corporate and union political contributions and expenditures in federal elections were transferred from 18 U.S.C. § 610 of the criminal code to the Federal Election Campaign Act. 2 U.S.C. § 441b(a).

The legislative history of the Federal Corrupt Practices Act has been described by Justice Rutledge as "a veritable fog of contradictions . . . ." *United States v. C.I.O.*, 335 U.S. 106, 134 (1948) (concurring opinion). Serious doubts as to the constitutionality of these sweeping restrictions on corporate and union political activity have been expressed for more than 30 years. In 1947, President Truman vetoed the Taft-Hartley Act in part, because of his conviction that the extension of the Federal Corrupt Practices Act to unions violated the First Amendment. H.R. Doc. No. 334, 80th Cong. 1st Sess. 9; *United States v. C.I.O., supra*, at 138-39 (concurring opinion).

In 1948, the Federal Corrupt Practices Act narrowly escaped condemnation in *United States v. C.I.O., supra*. Four Justices of the Court expressed "the gravest doubt . . . as to [the Act's] constitutionality," but were able to avoid "the dangers of unconstitutionality" by a tortured construction of the Act which enabled them to affirm the dismissal of an indictment against the CIO without reaching the First Amendment issues. Four other Justices of the Court declared the Act "patently invalid" under the

First Amendment in a textbook opinion by Justice Rutledge joined by Justices Black, Douglas and Murphy. Justice Frankfurter's swing vote cited the *government's* concessions in the trial court that the Act "is an abridgment of 'rights guaranteed by the First Amendment'" (335 U.S. at 127) as a reason for refusing to decide the constitutionality of the Act. *See also United States v. UAW-CIO*, 352 U.S. 567, 593-98 (1957) (dissenting opinion of Justice Douglas in which Chief Justice Warren and Justice Black joined).

Recent decisions of this Court have reinforced the conviction that the FECA's sweeping ban of both "expenditures" and "contributions" by corporations "in connection with" federal elections violate the First Amendment. *Buckley v. Valeo, supra; First National Bank of Boston v. Bellotti, supra; Consolidated Edison Co. v. Public Service Commission,* 447 U.S. 530 (1980); *Citizens Against Rent Control v. City of Berkeley, supra.* This conclusion has been confirmed by Justice White, who has observed that the combined effect of *Buckley* and *Bellotti* has been merely "to reserve formal the interment of the Corrupt Practices Act [now 2 U.S.C. § 441b(a)] . . . for another day. . . ." *First National Bank of Boston v. Bellotti, supra,* at 821 (dissenting opinion).

II.

The Statute Deprives the Electorate of Potentially Relevant Political Information from Corporate Sources

America's corporations are deep and diverse reservoirs of information on a wide range of economic and other topics that are relevant to voters in selecting their elected representatives. The statute excludes corporations from political debate. Its "object was . . . to force [corporations and] unions . . . entirely out of political

life and activity, . . . concerning matters affecting their vital interests at the most critical point where the expression would become effective." *United States v. C.I.O.*, *supra*, at 150 (concurring opinion).

The Act rests on the premise that the government has the constitutional right to "protect" the electorate by suppressing information from corporate sources that might unduly influence their decisions as voters. "'[U]ndue influence' in this connection may represent no more than convincing weight of argument fully presented . . . the very thing the Amendment and the electoral process . . . were intended to bring out." *United States v. C.I.O.*, 335 U.S. 106, 145 (concurring opinion).

The statute limits the information available to voters about the platforms and policies of candidates for President or Congress primarily to that provided by candidates, political parties and the press. "[T]he press does not," as Justice Powell observed in *Bellotti*, "have a monopoly on either the First Amendment or the ability to enlighten" voters concerning campaign issues. 435 U.S. at 782.

In *C.I.O.*, the four concurring Justices protested the "ostrichlike conception" of the Act which "deprives the electorate, the persons entitled to hear, . . . of the advantage of free and full discussion . . ." by corporations and unions of the qualifications of candidates for President and Congress. 335 U.S. 144. "To say that labor unions [and corporations] . . . have nothing of value to contribute to that process . . . is to ignore the obvious facts of political and economic life." *Id.*

This Court has repeatedly stressed that "in applying the First Amendment . . . we have rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech much less political

speech in the belief that '[P]eople will perceive their own best interests if only they are well enough informed and . . . the best means to that end is to open the channels of communication, rather than to close them . . .'" *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 562 (1980). *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *First National Bank of Boston v. Bellotti*, *supra*, at 790-91; *United States v. UAW-CIO*, *supra*, at 593 (dissenting opinion).

The First Amendment "remove[s] 'governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely in the hands of each of us in the hope that the use of such freedom will ultimately produce a more capable category and more perfect polity. . . .'" *Consolidated Edison*, *supra*, at 524.

The Act thus conflicts with the First Amendment's "informational purpose" which, as the Court explained in *Bellotti*, "goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public [and especially voters] may draw." 435 U.S. at 783.

III.

The Issues Are Not Controlled by National Right To Work Committee

The lower court did not make an independent assessment of the First Amendment issues certified by the panel nor did it give the statute the "exacting scrutiny" which decisions of this Court require in First Amendment cases. Rather, the lower court ruled that it was foreclosed from

making a careful inquiry by this Court's ruling in *FEC v. National Right to Work Committee, supra,* — U.S. —, 74 L.Ed.2d 364 (1982).

National Right to Work Committee involved different issues and is not controlling. *NRWC* involved two issues: (1) whether contributors to NRWC's political action committee were "members" of the Committee, and, if they were not, (2) were the provisions of 2 U.S.C. § 441b(b) (4) (C), which prohibited nonprofit corporations from soliciting contributions from non-members violative of the non-members' "associational interests" under the First Amendment. The Court's negative responses to these issues did not address, much less foreclose, the First Amendment issues raised by the appellants.[2]

---

[2] The opinion in *NRWC* was authored by Justice Rehnquist, whose views on the First Amendment are not always in accordance with the views of the majority on First Amendment issues over the last 50 years. Thus, in his dissenting opinion in *Bellotti,* Justice Rehnquist argued that the First Amendment has only "limited application . . . to the States," 435 U.S. at 823, and would apparently overrule *Grosjean v. American Press Co.,* 297 U.S. 233 (1936). 435 U.S. at 823. He also dissented in all of this Court's recent decisions recognizing the First Amendment rights of corporations, including *Bellotti, supra; Citizens Against Rent Control v. Berkeley,* 454 U.S. 290 (1981); *Consolidated Edison Co., supra;* and *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557 (1980). In *NRWC,* Justice Rehnquist, in *dictum,* cited cases from outside the First Amendment area involving economic regulation of interstate commerce to support the assertion that corporations have "special characteristics" that require that the Court "accept Congress's judgment . . . [and not] second guess a legislative determination as to the need for prophylactic measures. . . ." 74 L.Ed.2d at 377. This *dictum* is in direct conflict with the many First Amendment cases in which this Court has refused to defer to legislative judgments where First Amendment rights have been infringed, and has subjected statutes infringing First Amendment rights to "exacting scrutiny" and required that the legislature bear the "heavy burden" of demonstrating the constitutionality of the restraints and that the statutes are "narrowly drawn." *See, e.g., Elrod v. Burns,* 427 U.S. 347, 362-63

(Continued on following page)

A three-judge district court has recently rejected a claim by the FEC that *NRWC* controlled as to the constitutionality of the $1,000 ceiling which Congress imposed in the Presidential Election Campaign Fund Act on the amount that PAC's are allowed to spend in support of the election of a candidate for President who is receiving federal campaign funds. *Democratic Party of the United States v. National Conservative Political Action Committee*, — F. Supp. — (E.D. Pa., Dec. 12, 1983) (*see* 52 U.S.L.W. 2369 (Jan. 10, 1984)). Judge Becker said:

> "We reject the proposition that NRWC and CMA undermine our conclusion that section 9012(f) stifles political debate protected by the First Amendment. . . .
>
> • • •
>
> "In sum, we do not read NRWC as overruling Buckley or as disturbing the result we reach here. Accordingly, we remain firm in our belief that, as a matter of law [citation], the expenditures barred by section 9012(f) are fully protected speech."

IV.

The Statute Is Unconstitutional Under the First Amendment and Prior Decisions of this Court

Specific portions of § 441b(a) are plainly unconstitutional under previous decisions of this Court.

A.

The Ban on Expenditures

In *Buckley v. Valeo, supra,* this Court held that the $1,000 ceiling imposed by the FECA on independent politi-

---

(Continued from previous page)

(1976); *Central Hudson Gas & Electric Corp. v. Public Service Commission, supra,* at 561-66; *Bellotti, supra,* at 786. Nor does it make any difference that Congress made the determination under consideration. *See United States v. Grace,* — U.S. —, 75 L.Ed.2d 736 (1983).

cal expenditures in candidate elections invalid under the First Amendment:

> "Second, quite apart from the shortcomings of § 608(e) (1) in preventing any abuses generated by large independent expenditures, *the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption* comparable to those identified with large campaign contributions. . . . Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive.
>
> • • •
>
> "While *the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process,* it heavily burdens core First Amendment expression. For the First Amendment right to '"speak one's mind . . . on all public institutions"' includes the right to engage in '" vigorous advocacy" no less than "abstract discussion."' *New York Times Co. v. Sullivan*, ... Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." 424 U.S. at 45-48 (emphasis supplied) (citations omitted).

Because the Act imposes not a ceiling, but a *total ban* on independent "expenditures" of corporate funds to influence the vote in federal elections, it is invalid under *Buckley*. *See United States v. C.I.O.*, *supra*, at 146 (the Act prohibits expenditures of " 'a dollar, or 50 cents, or $500 or $1,000' ").

The ban on expenditures is also invalid because it indiscriminately prohibits corporations from publishing

truthful information about a candidate for President or Congress.[3]

Even *false* statements about candidates for public office are entitled to a measure of First Amendment protection. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Brown v. Hartlage*, 456 U.S. 45, 60-62 (1982) (holding invalid Kentucky Corrupt Practices Act that prohibited false campaign promises). A *fortiori*, the government has no power to prohibit corporations, unions, or anyone else from publishing *truthful* information to the electorate about a candidate for public office. *Consolidated Edison Co. v. Public Service Commission*, *supra*, at 534 ("[T]he First Amendment 'embraces at the least the liberty to discuss publicly and *truthfully* all matters of public concern', *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940)."). *Central Hudson*, *supra*, at 562 ("Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all").

No governmental interest can be conceived that would justify the punishment of a corporation for using corpo-

---

[3] The dangers are not imaginary. Small corporations have been indicted for using corporate funds with unanimous shareholder approval to publish a list of Congressmen whose voting record indicated belief in "our free enterprise system, our constitutional government and freedom under God." *See United States v. Lewis Foods Co.*, 236 F. Supp. 849, 851 (S.D. Cal. 1964), *rev'd*, 366 F.2d 710 (9th Cir. 1966). The FEC also sued a small corporation for spending $135 in corporate funds to publish and mail a list of "Big Spenders" in Congress. *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980).

rate funds to publish something that is true about the President or a Congressman. Indeed, this Court has struck down overly-broad statutes because they restricted truthful information about candidates, *Mills v. Alabama*, 384 U.S. 214 (1966) (election day political appeals), or even the dissemination of truthful commercial information. *See, e. g., Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977) (ordinance restricting "For Sale" signs held invalid because "*in any event* the First Amendment disabled the State from achieving its goal by restricting the free flow of truthful information" (emphasis supplied)); *Central Hudson Gas & Electric Corp. v. Public Service Commission, supra; Consolidated Edison Co. v. Public Service Commission, supra*, at 534.

The Act's ban on corporate political expenditures also collides head-on with the decisions of this Court holding invalid source restrictions,[4] and content-based restrictions on First Amendment rights.[5]

---

[4] For example, an ad endorsing Ronald Reagan or Walter Mondale for President is legal if published by an individual or a partnership, but is unlawful if the same ad is published at corporate or union expense. *See, e.g., Consolidated Edison Co. v. Public Service Commission, supra*, at 533 ("The restriction on bill inserts cannot be upheld on the ground that Consolidated Edison is not entitled to freedom of speech"); *First National Bank of Boston v. Bellotti, supra*, at 784-85.

[5] For example, a corporation is free to lobby and advocate a corporate point of view on an abstract issue, but if an advertisement mentions a specifically identifiable candidate, the corporation is liable to penalties under the Act. *See United States v. Lewis Food Co., supra; FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980). Content-based restrictions are a form of censorship and are *per se* unlawful under the First Amendment. *See, e.g., Consol-*

(Continued on following page)

The ban is both over-inclusive and under-inclusive. Most of the corporations covered by the ban are small businesses that present no threat of undue influence or corruption. Of the 2.5 million corporations in the United States subject to the ban, over 1.4 million (56%) have total assets of less than $100,000, while 92% (2.3 million) have assets of less than $1,000,000. U.S. Bureau of Census, *Statistical Abstract of the United States,* 1982-83 p. 536 (Table 899) (103d ed.). Assuming for the sake of argument that large corporations such as General Motors or Exxon may have sufficient resources to exert an "undue influence" on the political process, there is no reason to ban Athens Lumber Company and the 1.4 million other small corporations from making independent expenditures to express their views concerning the election of candidates for Congress because of the candidates' stands for or against legislation affecting their particular businesses.

The ban is also under-inclusive. As this Court has already recognized. "Some of the most powerful private institutions in the Nation" conduct business in "partnership form. Wall Street law firms and stock brokerage firms provide significant examples." *Bellis v. United States,* 417 U.S. 85, 93 (1974). The Big Eight accounting firms are also partnerships and have annual revenues approaching $1 billion,[6] far exceeding those of Athens Lum-

---

(Continued from previous page)

idated Edison Co. v. Public Service Commission, supra, at 537-38 ("To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth"); *First National Bank of Boston v. Bellotti, supra,* at 791-92 (n.31); *Police Department of City of Chicago v. Mosley,* 408 U.S. 92 (1972).

[6] The Year of the Accountant, *N.Y. Times* Jan. 3, 1982.

ber Company and most corporations covered by § 441b (a). Yet partnerships, trusts and other unincorporated business and non-business organizations are exempt from § 441b(a) and are free to make unlimited "expenditures" for political advocacy, *Buckley v. Valeo, supra,* and to make contributions of up to $1,000 to a candidate for federal office.

The ban on corporate political expenditures "give[s] the institutionalized political parties an almost impervious monopoly over the agenda and terms of debate in [not only] presidential [but all federal] electoral campaigns. Were we to give our blessing to the law . . . we would be permitting only those few with control over our major political parties, our institutionalized press or with vast individual resources . . . to be heard above the din of everyday existence. Where the threat of corruption is so minimal, we cannot so abnegate our responsibilities." *Democratic Party of the United States v. National Conservative Political Action Committee, supra.*

B.

The Ban on Contributions

There are also good reasons to conclude that the Act's total ban on political contributions by corporations constitutes both an overly-broad and discriminatory infringement on First Amendment rights.

The ban rests on the unsupported premise that there is a connection between the manner in which a business is organized (*i. e.*, the act of incorporation) and the likelihood of corruption of public officials by contributions from corporate sources. Incorporation is at most a neutral fact. Corporations are no better and no worse than in-

dividuals or other organizations. A $100 contribution from Athens Lumber Company to a candidate for President is no more likely to corrupt Ronald Reagan or John Glenn than a $100 contribution from a wealthy individual, or a large law firm or accounting firm. The ban discriminates arbitrarily against corporations which are prohibited from giving even a penny to a candidate for federal office. A convicted narcotics peddler, on the other hand, is permitted to give $1,000 to each of the members of the Senate Select Committee on Racketeering. Such "exceptions to the general prohibition are of great significance in assessing the strength of the [governmental] interest . . ." served by the statute. *Metromedia, Inc. v. San Diego*, 435 U.S. 490, 520 (1981).

In *Buckley*, the Court recognized that the right to make a political contribution directly to a candidate is a First Amendment right. The Court emphasized that the "First Amendment protects political association as well as political expression" [424 U.S. at p. 15], and that "[a] contribution serves as a general expression of support for the candidate" [*id.* p. 21], and that "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate." 424 U.S. at 22. The Court found, however, that these First Amendment rights were not significantly infringed by the $1,000 contribution ceiling because § 608(b) expressly preserved the donor's right to affiliate with and express his support of a candidate by making *a significant contribution* of up to $1,000 to the candidate's campaign. 424 U.S. at 24-29.

The Court held that the $1,000 ceiling was narrowly drawn and no broader than necessary because it specifically addressed the danger area and did not invade First

Amendment rights of smaller contributors whose contributions carried no significant potential for corruption:

> "The Act's $1,000 contribution limitation *focuses precisely on the problem of large campaign contributions*—the narrow aspect of political association where the actuality and potential for corruption have been identified—while leaving persons free to . . . assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources. . . .
>
> "We find that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling."
>
> 424 U.S. at 28-29 (emphasis supplied).

In view of the determination by Congress that contributions of up to $1,000 per candidate for individuals and other organized groups are not likely to corrupt or "secure a political *quid pro quo* from current office holders . . .," the total ban on all political contributions by corporations is overly broad under the First Amendment.

C.

Vagueness

This Court has emphasized that "'stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech.'" *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) (Burger, C.J.).

Vagueness was one of many defects on which the four Justices would have invalidated the Federal Corrupt Practices Act in *United States v. C.I.O.* As Justice Rutledge explained:

"It is difficult to conceive a statute affecting [First Amendment] rights more lacking in precision, more broad in the scope of doubt and uncertainty of its reach.

"We have only the broad and indefinite words 'expenditure in connection with any election.' Apart from the literal sweep of 'expenditure' and the large area of doubt created by efforts to confine it, what is 'in connection with'? What is a forbidden because a political comment? What sorts of union activities outside of publishing a newspaper with unsegregated funds would fall under the ban?"

335 U.S. at 151 (concurring opinion).[7]

"To the gambles of the statute itself are added those of guessing not only at its perimeter but at its very center. . . .

"Vagueness and uncertainty so vast and all-pervasive seeking to restrict or delimit First Amendment freedoms are wholly at war with the long-established constitutional principles surrounding their delimitation. They measure up neither to the requirement of narrow drafting to meet the precise evil sought to be curbed nor to the one that conduct proscribed must be defined with sufficient specificity not to blanket large areas of unforbidden conduct with doubt and uncertainty of coverage."

335 U.S. at 153 (concurring opinion).

---

[7] In a footnote, Justice Rutledge elaborated on the ambiguity of the statute:

"When does the connection begin? Obviously not with the date of the election, primary, convention or caucus. How long beforehand, with the announcement of candidacies or with earlier though not always public efforts to induce persons to run? When does the connection end? With the selection of candidates in the one case and the election of officers in the other or does it extend to activities relating to these events taking place later?"

335 U.S. at 151 (n.28).

In *Buckley v. Valeo*, the Supreme Court found that § 608(e) (1) of the FECA that prohibited expenditures "in relation to" an election of candidates for federal office, was, *standing alone*, unconstitutionally vague. The Court salvaged the vague language by incorporating limitations contained in another subsection of the same Act:

> *"The constitutional deficiencies* . . . can be avoided only by reading § 608(e) (1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate, much as the definition of 'clearly identified' in § 608(e) (2) requires that an explicit and unambiguous reference to the candidate appear as part of the communication. . . . *We agree that in order to preserve the provision against invalidation on vagueness grounds*, § 608(e) (1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."

424 U.S. at 43-44 (emphasis supplied).

There is no similar clarifying statute available to eliminate the vagueness of the "in connection with" language of § 441b(a). *Buckley*, therefore, reinforces Justice Rutledge's conclusion in *C.I.O.* that § 441b(a) is unconstitutionally vague.

This conclusion is further supported by the Court's alternative holding in *Bellotti*. In *Bellotti*, the Court ruled that, even if Massachusetts' prohibition on corporate political contributions and expenditures had been otherwise "unobjectionable," the statute was unconstitutionally vague. Justice Powell explained in footnote 21 of the majority opinion that:

> "Even assuming that the rationale behind the 'materially affecting' requirement itself were unob-

> jectionable, *the limitation in § 8 would have an impermissibly restraining effect on protected speech.* Much valuable information which a corporation might be able to provide would remain unpublished because corporate management would not be willing to risk the substantial criminal penalties—personal as well as corporate—provided for in § 8. . . . As the facts in this case illustrate, management never could be sure whether a court would disagree with its judgment as to the effect upon the corporation's business of a particular referendum issue. In addition, the burden and expense of litigating the issue—especially when what must be established is a complex and amorphous economic relationship—would unduly impinge on the exercise of the constitutional right. '[T]he free dissemination of ideas [might] be the loser.'"

435 U.S. at 785 (n.21) (emphasis supplied) (citations omitted).

Section 441b(a) violates the stricter standards of vagueness that apply in First Amendment cases and is, therefore, invalid.

CONCLUSION

Judge Irving Kaufman has highlighted the "disturbing legacy of the Federal Election Campaign Act." *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F. 2d 45, 53 (2d Cir. 1980). He condemned the Federal Election Commission for its "insensitivity to First Amendment values" and for having "failed abysmally to meet [its] awesome responsibilities." He warned of the danger of creating a federal agency as a watchdog over federal elections:

> "Officials can misuse even the most benign regulation of political expression to harass those who oppose them . . . thereby depriving citizens of valuable opin-

> ions and information. This danger is especially acute when an official agency of government has been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a potential 'evil' to be tamed, muzzled or sterilized."
>
> 616 F. 2d at 54-55.

Judge Kaufman found the Federal Election Campaign Act "disturbing because citizens of this nation should not be required to account to [the FEC or] this court for engaging in debate of political issues. . . . Moreover, it is incongruous to compel [an organization] to convince a court that they have not dared to 'expressly advocate' the defeat of a candidate for public office. I had always believed that such advocacy was to be applauded in a representative democracy." *Id.*, at p. 54.

The constitutionality of the prohibition of corporate political expenditures and contributions has been widely debated for over 50 years. The issue should be squarely addressed and resolved.

EMMET J. BONDURANT

JEFFREY O. BRAMLETT

Attorneys for Appellants
Athens Lumber Company, Inc.,
and John P. Bondurant

OF COUNSEL:

BONDURANT, MILLER, HISHON & STEPHENSON
2200 First Atlanta Tower
Atlanta, Georgia 30383-4501
(404) 581-5200

APPENDIX A

ATHENS LUMBER COMPANY, INCORPORATED,
John P. Bondurant,

Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION and William F. Smith, in his official capacity as Attorney General of the United States,

Defendants-Appellees.

No. 82-8102.

United States Court of Appeals,
Eleventh Circuit.

Oct. 24, 1983.

Appeal from the United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., Chief Judge.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT and CLARK, Circuit Judges.*

PER CURIAM:

This case was taken en banc by vote of the judges of this court pursuant to Rule 35 Fed. R. App. P. and not under 2 U. S. C. § 437h.

---

*Judge Anderson is recused and did not participate in this decision.

Standing as found by the panel opinion in *Athens Lumber Company, Inc. v. Federal Election Commission*, 689 F. 2d 1006 (11th Cir. 1982) now vacated, is found by this en banc court for the reasons given in the panel opinion.

Viewing the substantive constitutional issues as being controlled by the Court's unanimous opinion in *Federal Election Commission v. National Right to Work Committee et al.*, — U. S. —, 103 S. Ct. 552, 74 L. Ed. 2d 364 (1982), and for the reasons there stated, we find the limitations and prohibitions of which appellants complain to be constitutional.

The judgment of the district court 531 F. Supp. 756 dismissing the case is REVERSED. The case is REMANDED for entry of judgment for defendant.

APPENDIX B

ATHENS LUMBER COMPANY, INCORPORATED, John P. Bondurant,

Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION and William F. Smith, in his official capacity as Attorney General of the United States,

Defendants-Appellees.

No. 82-8102

United States Court of Appeals,
Eleventh Circuit.
Oct. 22, 1982.

Appeal from the United States District Court for the Middle District of Georgia.

Before HILL and CLARK, Circuit Judges, and SCOTT*, District Judge.

JAMES C. HILL, Circuit Judge:

Appellant Athens Lumber Co. and its President, John P. Bondurant, challenge the constitutionality of a 2 U. S. C. § 441b(a)[1] of the Federal Election Campaign Act (FECA)

---

*Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, sitting by designation.

1. It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election

(Continued on following page)

insofar as it prohibits a corporation from making direct political contributions and expenditures in a federal election. They ask that we certify the issues raised by their complaint to the United States Court of Appeals for the Eleventh Circuit en banc pursuant to the expedited procedures provided in 2 U. S. C. § 437h. The district court, 531 F. Supp. 756, refused such certification and dismissed appellants' claim for want of Article III jurisdiction. We reverse, and find that both Athens and Bondurant have presented justiciable claims. We hold further that, although Athens is not a proper plaintiff to invoke section 437h expedited review, Bondurant is a proper plaintiff, and also has standing to raise, vicariously, those issues relating to Athens. Thus, we certify certain constitutional challenges raised by appellants to the court of appeals en banc.

I

Athens Lumber Co. ("Athens") is a Georgia corporation engaged in the manufacture of architectural millwork

---

(Continued from previous page)

to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director or any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be prohibited by this section.

and the sale of building materials. In July 1981, the company's six shareholders unanimously passed a resolution authorizing the President of Athens, John P. Bondurant, to spend $10,000 on federal election campaigns. The resolution provides that the money is to come directly from corporate assets and is to be used for contributions of no greater than $100 to candidates sympathetic to corporate interests. In addition, the shareholders authorized Bondurant to spend 50% of the allocated funds for politically oriented bill inserts, as well as for newspaper, radio, and television advertisements supporting appropriate candidates. Recognizing that the proposed expenditures and contributions would violate 2 U.S.C. § 441b(a) of the FECA, the resolution provides further that no expenditure or contribution is to be made unless § 441b(a) either is repealed or declared invalid by a court of competent jurisdiction. Accordingly, Bondurant was authorized to retain a law firm for the purpose of initiating an appropriate action on behalf of the company.[2]

---

2. After recognizing that the policies of the federal government significantly impact the company, the shareholders of Athens resolved that:

> (1) The President of the Company is hereby authorized to expend a maximum of $10,000 through December 31, 1984 to support the election to national office of those persons whom he believes to be best qualified and who will best serve the people of the United States, and the interests of the Company, its employees, shareholders and customers; such candidates may include candidates for election to the United States House of Representatives, the United States Senate, and President or Vice President of the United States or member of the Electoral College to be nominated or elected at any primary, general or special election or political convention at which such candidates

(Continued on following page)

Soon after passage of the shareholders' resolution, the company filed a complaint in the United States District Court for the Middle District of Georgia for a declar-

---

(Continued from previous page)

are to be nominated or elected held during 1981 through 1984.

(2) No contribution or other gift of money directly to a candidate or a campaign of a candidate shall exceed $100 per candidate or campaign without the prior approval of the Board of Directors.

(3) At least 50% of the fund shall be expended by the Company, independently of the campaign of any candidates for public office, on newspaper, radio, and television advertisements endorsing, promoting or opposing the election of specifically identified candidates to federal office.

(4) The President is authorized to include, at the expense of the Company, messages endorsing the positions of and urging the election of specifically identified candidates for federal office, in monthly statements regularly mailed by the Company to its customers and in letters mailed by the Company to its suppliers and persons whom the President may designate.

(5) No contributions or expenditures shall be made for political purposes, either from the special fund provided for in subparagraph 1 above, or from any other funds of the Company, until (a) 2 U.S.C. § 441b(a) is either repealed or declared invalid by a court of competent jurisdiction, and (b) the Company receives an opinion of counsel that the proposed expenditure or contribution does not violate any other valid provision of federal or state law, or any valid regulation of the Federal Election Commission or other regulatory agency.

(6) The President is hereby authorized to employ Trotter, Bondurant, Miller & Hishon to represent the Company and the President in bringing any appropriate suit on behalf of the Company under 2 U.S.C. § 437h(a), and such other statute as may be appropriate seeking a determination of the validity of 2 U.S.C., § 441b(a) by a court of competent jurisdiction.

Record, vol. I at 22-23.

atory judgment determining the constitutionality of section 441b(a). The named plaintiffs included Athens and Bondurant, both in his capacity as president of the company and his individual capacity as a qualified voter. On behalf of Athens, the complaint alleged that section 441b(a) interferes with the company's rights under the first and fifth amendments. Not only is it asserted that section 441b(a) inhibits the company's freedom to speak politically and is overbroad in its prohibition of contributions and expenditures in federal elections, but it is also alleged that the statute arbitrarily discriminates between corporations, banks, and unions on the one hand, and natural persons and other organizations on the other. By virtue of this discrimination, Athens maintains that the statute dilutes its political voice. On behalf of Bondurant, the complaint asserts that the Act impinges upon his right as a voter to receive political information from corporate sources relating to the relative qualifications of candidates for federal office.

Because the complaint raised several constitutional challenges to the FECA, appellants asked the district court to invoke the expedited procedures embodied in 2 U. S. C. § 437h and to certify the issues directly to the en banc court of appeals. The district court, however, refused to expedite the proceedings. Instead it dismissed the complaint on jurisdictional grounds, holding that neither the company nor Bondurant presented a justiciable case or controvery within the meaning of Article III of the Constitution. The court rejected Athens' claim of Article III jurisdiction because the challenged statute does not interfere with the company's business of manufacturing and selling architectural millwork and selling building materials. In

support of its position the court noted that prior to the July 1981 resolution, Athens never expressed any desire to enter the political arena. In addition, Athens was found to be seeking an advisory opinion because the company had no intention of breaking the law. Under the terms of the shareholders' resolution, no contributions or expenditures may be made so long as section 441b(a) remains in effect. With respect to Bondurant's claim, the court found no justiciable case or controversy because Bondurant remains "free to independently expend his personal funds, including dividends from the corporate plaintiff without limitation." From this dismissal, appellants filed a timely notice of appeal.

II

When Congress enacted the FECA, it was wary of the constitutional ramifications of its action. As a result, certain procedures were incorporated into the Act that were designed to facilitate prompt review by the United States Supreme Court of any constitutional challenges to the legislation. 120 Cong. Rec. 10,562 (1974) (remarks of Sen. Buckley); 120 Cong. Rec. 35,140 (1974) (remarks of Rep. Frenzel). One of these procedures for expedited review appears in section 437h and provides in part:

> The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals

> for the circuit involved, which shall hear the matter sitting en banc.

2 U. S. C. § 437h(a). Section 437h provides further that any decision rendered by the court of appeals en banc is reviewable by direct appeal to the Supreme Court. *Id.* § 437h(b). Moreover, both the courts of appeals and the Supreme Court are directed to expedite the disposition of all issues certified pursuant to the statute. *Id.* § 437h(c).

[1, 2] In order to be eligible to invoke the expedited procedures of section 437h, a plaintiff must fall within one of the three classes of plaintiffs enumerated in the statute. *Bread Political Action Committee v. FEC*, — U. S. —, 102 S. Ct. 1235, 71 L. Ed. 2d 432 (1982). Thus, the only plaintiffs who may certify questions challenging the validity of the FECA to a court of appeals en banc are the FEC, the national committee of any political party, or an individual eligible to vote in a presidential election. *Id.*; 2 U.S.C. § 437h. As a corporation, Athens is unable to certify its constitutional challenges pursuant to the statute. Athens, however, may challenge section 441b of the FECA under the federal question jurisdiction granted federal courts in 28 U. S. C. § 1331 so long as the company satisfies the "usual" standing requirements. *Bread, supra,* 102 S. Ct. at 1240. Bondurant, on the other hand, is an individual voter, and as such is qualified to invoke expedited review under section 437h.

The Court's literal construction of section 437h(a) in *Bread* was buttressed by the clear language of the statute as well as the practical considerations involved in calling circuit judges away from their normal caseloads for expedited en banc hearings. — U. S. at —; 102 S. Ct. at 1238. Similar practicalities also prompted the requirement that

plaintiffs acting under section 437h satisfy the minimum standing requirements embodied in Article III of the Constitution. In *California Medical Association v. FEC*, 543 U. S. 182, 101 S. Ct. 2712, 69 L. Ed. 2d 567 (1981), the Court rejected the view of the FEC that section 437h was subject to rampant abuse, arguing that

> "[t]he unusual procedures embodied in this section are, at the very least, circumscribed by the constitutional limitations on the jurisdiction of federal courts." 453 U. S. at 193 n. 14, 101 S. Ct. at 2719 n. 14.[3] The Court went on to conclude that one of the many Article III limitations imposed on a party acting under section 437h is the requirement of standing. *Id.* This requirement was restated again in *Bread*: "Thus, § 437h affords its unique system of expedited review to three carefully chosen classes of persons who might meet the minimum standing requirements of Article III." — U. S. at —; 102 S. Ct. at 1238; *e.g., International Association of Machinists & Aerospace Workers v. FEC*, 678 F.2d 1092, 1097-99 (D.C. Cir. 1982) (en banc) (per curiam).[4]

---

3. *Accord Buckley v. Valeo*, 424 U.S. 1, 11, 96 S.Ct. 612, 630, 46 L.Ed.2d 659 (1976) (per curiam) ("At the outset we must determine whether the case before us presents a 'case or controversy' within the meaning of Article III"); *Clark v. Valeo*, 559 F.2d 642, 646 n. 2 (D.C.Cir.) (en banc), *aff'd sub nom., Clark v. Kimmitt*, 431 U.S. 950, 97 S.Ct. 2667, 53 L.Ed.2d 267 (1977) ("A District Judge requested to make certification under § 437h should be free to dismiss for want of jurisdiction, or to permit that question to be decided by this court en banc . . . .")

4. Notwithstanding the Court's recognition of a standing requirement, appellants urge that in enacting section 437h, Congress intended to confer standing on qualified voters thereby creating a legal right to challenge the constitutionality of the FECA. In essence, appellants maintain that Congress provided the "injury in fact" element of standing by

(Continued on following page)

Accordingly, to invoke section 437h review a party must be a proper plaintiff as defined in the statute and must have sufficient standing to satisfy the case and controversy requirement of Article III. As discussed above,

---

(Continued from previous page)

conferring on voters the right to sue when they would be unable to sue in the absence of the statute. *See Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n. 3, 93 S.Ct. 1146, 1148 n. 3, 35 L.Ed.2d 536 (1973). In support of this proposition we are referred to *RITE—Research Improves the Environment, Inc. v. Costle*, 550 F.2d 1312 (5th Cir. 1981) which upheld this proposition with respect to citizens' suits pursuant to section 505 of the Federal Water Pollution Control Act, 33 U.S.C. § 1365. In *RITE* the former Fifth Circuit recognized that

> [w]hile every lawsuit which receives judicial review on on the merits must fall within the scopt of Article III of the Constitution, it is a matter of black letter law that Article III does not limit congressional power to define categories of individuals as parties sufficiently aggrieved by a particular governmental action to warrant a statutory right to sue.

650 F.2d at 1320; *accord National Treasury Employees Union v. Campbell*, 654 F.2d 784, 789 (D.C.Cir. 1981); L. Tribe, *American Constitutional Law* 80 (1978). As a further example of this position appellants cite *Havens Realty Corp. v. Coleman*, — U.S. —, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) which involved Black testers who posed as home purchasers for the sole purpose of collecting evidence of unlawful racial steering practices. Despite the fact that the testers fully expected to receive false information, they were granted standing on the basis of section 804(d) of the Fair Housing Act, 42 U.S.C. § 3604(d), which "establishes an enforceable right to truthful information concerning the availability of housing . . . ." — U.S. at —; 102 S.Ct. at 1121.

Without questioning Congress' ability to create a statutory right and to confer standing on particular individuals to enforce that right, we find that section 437h is not such a statute. Section 437h does not create a cause of action for enforcing a statutory right. Instead section 437h simply confers standing on certain classes of plaintiffs to invoke the expedited procedures incorporated in the statute. *See* 120 Cong. Rec. 10562 (1974) (remarks of Sen. Buckley) ("It [§ 437h] merely provides for the expeditious review of the constitutional questions I have raised").

Athens is not a proper plaintiff and may not certify its challenges to the court of appeals en banc. Nor may the company remain in this suit as it travels to the court of appeals en banc. 678 F. 2d at 1098 (dismissing a union from a suit brought under section 437h but permitting individual voter plaintiffs to continue the suit). However, because Athens may wish to raise its challenges through normal procedures for declaratory relief, we must review the district court's ruling that the company failed to raise a justiciable claim. Bondurant, on the other hand, is a proper plaintiff under section 437h. Nevertheless, he too must satisfy the individual standing requirements necessary to support federal court jurisdiction consistent with Article III.

III

[3] For the most part, traditional standing analysis governs our evaluation of appellants' standing claims. In *Bread*, the Supreme Court indicated that "minimum standing requirements" must be satisfied by qualified plaintiffs acting under section 437h. Although *Bread* fails to explain what standing satisfies these minimum requirements, in *Valley Forge Christian College v. Americans United for Separation of Church and State*, — U. S. —, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982), the Court defined what it termed the "irreducible minimum" standing necessary to invoke the jurisdiction of a federal court. That irreducible minimum includes proof of both individualized "actual injury"[5]

---

5. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979); *see Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975) ("distinct and palpable injury"); *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962) ("personal stake in the outcome").

and a "fairly traceable" connection between the claimed injury and the challenged action so that a favorable verdict will redress the injury.[6] 102 S. Ct. at 758; *ALCU v. Rabun County Chamber of Commerce, Inc.*, 678 F. 2d 1379, 1384 (11th Cir. 1982).

Both Athens and Bondurant allege that threshold standing requirements are satisfied on the basis of a threat of prosecution theory. If the company were to begin its proposed program of contributions and expenditures, it would be subject to the civil and criminal sanctions embodied in the FECA. See 2 U. S. C. § 437g. Similarly, as an officer of the corporation, Bondurant would be subject to the same penalties. *See* 2 U. S. C. § 441b(a); 2 U. S. C. § 437g(d)(1)(A).[7] The company therefore asserts that its claim of standing squares directly with the standing implicitly recognized in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed. 2d 707 (1978).

---

6. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72, 98 S.Ct. 2620, 2629, 57 L.Ed.2d 595 (1978); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1977); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41, 96 S.Ct. 1917, 1925, 48 L.Ed.2d 450 (1976).

7. 2 U.S.C. § 437g(d)(1)(A) provides:

> Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

See also 2 U.S.C. § 437g(a)(6).

In *Bellotti*, two national banks and three business corporations sought a declaratory judgment determining the constitutionality of a Massachusetts criminal statute. The statute prohibited certain expenditures by banks and corporations for the purpose of influencing the vote on referendum proposals. Each of the corporate plaintiffs wanted to make financial contributions to publicize their views on a proposed state constitutional amendment involving the imposition of a graduated income tax. They were informed, however, that such contributions would result in prosecution under the challenged statute. 435 U.S. at 769, 98 S.Ct. at 1412. Although the Supreme Judicial Court for the State of Massachusetts upheld the statute, plaintiffs appealed the decision to the Supreme Court, arguing that the statute violated their first amendment right to engage freely in political speech. In evaluating the justiciability of the claim, the Court focused on the issue of mootness rather than standing.[8] 435 U.S. at 774-75, 98 S.Ct. at 1414-1415. Nevertheless, the anticipatory nature of the claim was acknowledged in the Court's reference to "the threat of prosecution" as opposed to any actual injury. *Id.* Thus, Athens maintains that because it is faced with the same threat of prosecution, it should have the same standing as the banks and corporate entities in *Bellotti*.

The district court rejected the analogy to *Bellotti* primarily because the Massachusetts statute imposed only criminal sanctions while the FECA imposes both criminal and civil sanctions. The court also attempted to minimize the threat of criminal prosecution by noting that appel-

---

8. The issue of mootness arose because the case did not reach the court until after the tax referendum was defeated. 435 U.S. at 774, 98 S.Ct. at 1414.

lants could spend less than $2,000 of corporate funds in violation of § 441b(a), expose themselves to civil penalties and create a "real controversy." We are unpersuaded by this reasoning. Appellants should not be required to expose themselves to prosecution to secure the desired relief so long as they have "alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder . . . ." *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979); *accord Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1215, 39 L.Ed.2d 505 (1974); *Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 745, 34 L.Ed.2d 201 (1973); *Let's Help Florida v. McCrary*, 621 F.2d 195, 198 (5th Cir. 1980), *cert. denied*, — U.S. —, 102 S.Ct. 999, 71 L.Ed.2d 293 (1982).

[4] The shareholder's resolution passed in July 1981 evinces Athens' intent to participate directly in the political dialogue of federal elections and section 441b(a)'s prohibition of such direct participation arguably impedes the company's first amendment right of free speech. *Bellotti, supra; see also Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed. 2d 319 (1980). There also is little doubt that a favorable declaratory judgment would allow the company to make its expenditures and contribution and afford an adequate remedy. The only difficult issue is whether a credible threat of prosecution exists so long as the resolution conditions political expenditures and contributions on repeal of the statute or a declaration of its unconstitutionality. It is uncontroverted that if Athens were to go forward with its proposal, both the company and Bondurant would

be subject to criminal and civil prosecution. Moreover, we acknowledge that the threat of criminal prosecution is very real as evidenced by the commendable zeal with which the Attorney General and the FEC approach their enforcement duties.[9] We therefore conclude that the threat of prosecution is not "imaginative or speculative" so as to render any decision by the court an advisory opinion. Indeed, as the Supreme Court recognized in *Steffel v. Thompson*, "it is not necessary that [appellant] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." 415 U.S. at 459, 94 S.Ct. at 1215 (citing *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968); *see also Clements v. Flashing*, — U.S. —, —, 102 S.Ct. 2836, 2843, 73 L.Ed.2d 508 (1982) ("[A]ppellees have alleged in a precise manner that, but for the sanctions of the statute they seek to challenge, they would engage in the very acts that would trigger the enforcement of the statute.").

IV

[5] Under the above analysis, both Athens and Bondurant have standing to seek a declaratory judgment under normal procedures because both are subject to the

---

9. *See, e.g., FEC v. Lance*, 617 F.2d 365 (5th Cir. 1980), *on submission en banc*, 635 F.2d 1132 (5th Cir.), *cert. denied*, 453 U.S. 917, 101 S.Ct. 3151, 69 L.Ed.2d 999 (1981); *United States v. Chestnut*, 533 F.2d 40, 50, 51 n. 12 (2d Cir.), *cert. denied*, 429 U.S. 829, 97 S.Ct. 88, 50 L.Ed.2d 93 (1976); *United States v. Boyle*, 482 F.2d 755 (D.C.Cir.), *cert. denied*, 414 U.S. 1076, 94 S.Ct. 593, 38 L.Ed.2d 483 (1973); *United States v. Clifford*, 409 F.Supp. 1070, 1072 (E.D. N.Y. 1976). *See generally* M. Stans, *Terrors of Justice*, 24-29 (1978).

same threat of prosecution for violations of section 441b (a). The next question is whether Bondurant has the requisite standing to expedite review on the basis of his threatened prosecution as corporate president, or whether he must rely solely upon his standing as a voter who is deprived of political information from corporations concerning federal elections. Clearly, Bondurant alleges standing in his capacity as a voter, asserting that he is denied access to all points of view in federal elections because of section 441b(a)'s prohibition on direct expenditures and contributions by corporations etc. The problem which arises when standing is asserted in such a generalized context, however, is the difficulty of demonstrating the "distinct and palpable injury" necessary to sustain a claim of individualized actual or threatened injury. *Valley Forge, supra,* 102 S.Ct. at 760 (citations omitted). But even putting aside the "distinct and palpable injury" requirement for the moment, Bondurant failed to allege how section 441b(a) denies him access to the political views of corporations. This deficiency occurs because the harshness of the prohibition on direct contributions and expenditures incorporated in section 441b(a) is alleviated somewhat by section 441b(b), which permits the use of general treasury funds for the establishment, administration, and solicitation of contributions for a segregated fund to be used for political purposes. 2 U.S.C. § 441b(b)(2)(C). Such segregated funds are administered by political action committees and can be used by corporations to make their political views known through committee contributions and expenditures. *See Pipefitters Local Union 562 v. United States,* 407 U.S. 385, 420, 431 n. 42, 92 S.Ct. 2247, 2267, 2272 n. 42, 33 L.Ed.2d 11 (1972). Indeed, an FEC release

dated July 17, 1981, evidences that 1251 public corporations, 577 trade, membership, and health organizations, 303 labor organizations, and 64 corporations without stock have formed committees for this very purpose. Brief for Appellee FEC, (Appendix). Thus, even viewing Bondurant's allegations in a most favorable light, he fails to demonstrate how the challenged statute significantly impedes corporations from making their political views known. Moreover, even if we were to assume that the flow of politically oriented corporate information would increase significantly if corporations could make direct, as opposed to indirect, contributions and expenditures, Bondurant's alleged injury is indistinguishable from that of any other voter. His claim of "voter standing," therefore, is untenable. *See Valley Forge, supra; United States v. Richardson,* 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974); *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 94 S.Ct. 2962, 41 L.Ed.2d 706 (1974); *Frothingham v. Mellon,* 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923).

The real threat of actual injury in this case is the threat of prosecution which arises out of Athens' desire to contribute and expend funds directly from the corporate treasury in lieu of a segregated fund. We therefore must determine whether an individual plaintiff can invoke the expedited procedures of section 437h by alleging standing in a capacity other than a voter. In other words, can Bondurant allege standing as a president of a corporation subject to a threat of prosecution and still claim the benefit of the expedited review afforded individual voters?

[6] The United States Court of Appeals for the District of Columbia recently addressed this issue and refused

to limit expedited review "to plaintiffs who put in issue their First Amendment rights qua voters." Instead, the court stated:

> *Martin Tractor* [*Co. v. FEC*, 460 F.Supp. 1017 (D.D.C.1978)] apart, we find no support for the Commission's position that section 437h(a) qualifies voters to raise constitutional issues only in relation to their rights as voters. Neither the language of the statute (*any* eligible voter, *all* constitutional questions) nor its legislative history suggests an interpretation so constricted. We note further that the Commission's view is difficult to reconcile with *California Medical Ass'n v. FEC*, [453 U.S. 182] 101 S.Ct. 2712 [69 L.Ed. 2d 567] (1981), in which the Supreme Court adjudicated a section 437h challenge to a provision of the Act regulating trade association activity. In short, we reject the FEC's severely limited voter standing delineation, disapprove *Martin Tractor* to the extent it adopted the Commission's view, and hold that the plaintiffs who are "individuals eligible to vote" in federal elections have statutory standing to invoke the section 437h certification procedure. *See California Medical Ass'n v. FEC*, 101 S.Ct. at 2717 n. 6 (1981); *Buckley v. Valeo*, 424 U.S. 1, 12, 96 S.Ct. 612, 631, 46 L.Ed.2d 659 (1976).

International Machinists, supra, 678 F.2d at 1098. We find this reasoning persuasive and adopt it as our own. Because we are satisfied that Bondurant has Article III standing by virtue of the threat of prosecution, and that he is an individual eligible to vote, we conclude that he is qualified to invoke the expedited procedures of section 437h.

[7] Having satisfied his individual standing requirements, we hold further that he may raise the claims of the corporate plaintiff which challenge the constitutionality of

section 441b(a). Unlike standing, which is an element of the constitutional requirement of "case or controversy," *In re Weaver*, 632 F.2d 461, 462 n. 6 (5th Cir. 1980), the general disfavor of jus tertii claims he is a prudential limitation of a non-constitutional dimension, which is designed simply "to limit access to the federal courts to those litigants best suited to assert a particular claim." *International Machinists, supra*, 678 F.2d at 1099 (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979).).[10] Here, Bondurant is in as good a position as the corporate plaintiff to assert the particular challenges to the statute's constitutionality. As President of the corporation, he is subject to the same threat of criminal and civil penalties and therefore has equal incentive to litigate all of the issues raised in the complaint. Thus, we join the D.C. Circuit in recognizing that Congress has not evidenced any desire to truncate the presentation of parties entitled to expedite review. 678 F.2d at 1099. We note further that our certification of most all of the issues raised by appellant's complaint is consistent with Congress' direction that we take all steps possible to expedite review of such claims. *See* 2 U.S.C. § 437h(c).

---

10. In *International Machinists* the D.C. Circuit cites a number of decisions in which individual plaintiffs were permitted to assert the rights of third parties: *Carey v. Population Services, Int'l.*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953). 678 F.2d at 1099.

[8] We, however, do make one caveat to certification of the issues raised by appellants in that we do not certify the challenges made with respect to national banks and labor unions. In *FEC v. Lance*, 635 F.2d 1132 (5th Cir.) (en banc), *cert. denied*, 453 U.S. 917, 101 S.Ct. 3151, 69 L.Ed.2d 999 (1981) (*Lance* II) the former Fifth Circuit sitting en banc evaluated that portion of section 441b making it unlawful for a national bank to make loans or to permit overdrafts in connection with an election and out of the ordinary course of business. 635 F.2d at 1141. In narrowly limiting standing, the court noted that section 441b "is a series of discrete, separable prohibitions," and that standing should be recognized only to the extent that a plaintiff has "such a personal stake" in the outcome so "as to assure that concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends for illumination of difficult . . . questions." 635 F.2d at 1140 (quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962).). Similarly, we narrow the standing of appellant Bondurant by refusing to allow him to argue for invalidation of the entire statute.[11] Although he is in a good position to make arguments for the corporations, he lacks the ability to adequately represent the challenges of labor unions qua unions and banks qua banks. This type of prudential limitation together with the minimum standing requirements authorized in *Bread* should preclude any abuse of the expedited procedures of section 437h.

---

11. The FECA contains a severability clause so that if part of the statute is invalidated by the court of appeals en banc, the remaining provisions will not be affected. 2 U.S.C. § 454.

V

Having determined that Bondurant presents a justiciable claim and is qualified to invoke certification procedures, we have two options. We either can remand the case to the district court with directions to conduct additional fact finding and certify the issues directly to the court of appeals en banc, or we can certify the issues directly. We choose the latter. *See FEC v. Lance*, 617 F.2d 365 (5th Cir. 1980) (*Lance* I).

Although certification is improper when resolution of the issues requires a fully developed factual record, *California Medical Association v. FEC*, 453 U.S. 182, 194 n. 14, 101 S.Ct. 2712, 2719 n. 14, 69 L.Ed.2d 567 (1981), we are convinced that the facts necessary to resolve the issues raised by appellants are legislative as opposed to adjudicative. As such they are as easily presented to the court of appeals en banc as to the district court. At this point, a remand to the district court would serve only to delay proceedings contrary to the Congressional mandate that we expedite certified matters "to the greatest possible extent . . . ." 2 U.S.C. § 437h(c). Submission to the en banc court, on the other hand, is consistent with the prompt review anticipated by Congress.[12]

---

12. Thus far the progression of these proceedings has been far from expeditious. Appellant's original complaint was filed on July 27, 1981. On September 29, 1981, the FEC was afforded an extension of time for filing its answer. The district court's order granting defendant's motion to dismiss was not granted until February 9, 1982. Only now, after more than a full year of litigation, is the case finally sent to the court of appeals en banc for determination on the merits.

Thus, we reverse the district court's finding of non-justiciability with respect to both Athens and Bondurant. However, we direct that only Bondurant be allowed to continue the action to the court of appeals en banc. Because Bondurant satisfies both the constitutional and statutory requirements necessary to invoke expedited review, and his standing to raise the issues relating to Athens, we certify the following issues directly to the en banc Court of Appeals:

> (1) Whether 2 U.S.C. § 441b(a) violates the First Amendment to the Constitution and is, therefore, invalid in that it prohibits the plaintiffs from making any direct political contributions from corporate funds of the Athens Lumber Company, Incorpodated, directly to candidates for federal office.
>
> (2) Whether 2 U.S.C. § 441b(a) violates the First Amendment to the Constitution and is, therefore, invalid and unenforceable against plaintiffs in that it absolutely prohibits the plaintiffs from making any expenditures of corporate funds, independent of the campaign of any candidate and regardless of amount, for newspaper, radio or television advertising to advocate the election or defeat of a specifically identified candidate for federal office.
>
> (3) Whether 2 U.S.C. § 441b(a) violates the First Amendment to the Constitution and is, therefore, invalid and unenforceable against plaintiffs in that it prohibits the plaintiffs from making any expenditures of corporate funds, independent of the campaign of any candidate, to pay the cost of preparing, printing and distributing letters advocating the election or defeat of specifically identified candidates for federal office to be included as inserts in the monthly bills mailed by the corporate plaintiff to its customers, the envelopes bearing the orders or checks mailed by the corporate plaintiff to its suppliers, or in other mail-

ings made by or at the expense of the corporate plaintiff.

(4) Whether the provisions of 2 U.S.C. § 441b (a), together with the provisions of 2 U.S.C. § 431(9) (B)(i), discriminate arbitrarily and unreasonably in violation of the First and Fifth Amendments between corporations engaged in businesses other than publication of newspapers and magazines, on the one hand, and corporations engaged in the publication of newspapers and magazines, on the other, by prohibiting corporations in the former category from making any contributions or expenditures in connection with any elections to federal office, while expressly permitting corporations that publish newspapers and magazines to make 'expenditures' of corporate funds to endorse, publicize the views of, and advocate the election and defeat of specifically identified candidates for public office.

(5) Whether the provisions of 2 U.S.C. § 441b (a) discriminate arbitrarily in violation of the First and Fifth Amendments between corporations, on the one hand, and natural persons and organizations that are not corporations, on the other, by:

(A) absolutely prohibiting corporations from making a direct contribution of money directly to a candidate for federal office, or the campaign of a candidate for federal office, while permitting natural persons and organizations that are not national banks, corporations or unions, to give up to $1,000 directly to candidates for federal office or to their campaigns; and

(B) absolutely prohibiting the plaintiff corporation, and other corporations from making any expenditures of corporate funds, independent of the campaign of a candidate for federal office, in any amount, when natural persons and other organizations are permitted to spend unlimited amounts to promote the election or defeat of specifically identified candidates.

(6) Whether the provisions of 2 U. S. C. § 441b(a) prohibiting contributions or expenditures by plaintiff corporation 'in connection with' any election for federal office are unconstitutionally vague under the First and Fifth Amendments.

(7) Whether 21 U. S. C. § 441b(a) is invalid under the First Amendment because it prohibits corporations other than the Athens Lumber Company, Incorporated, and national banks and labor unions from making any expenditure of corporate funds to advocate the election or defeat of candidates for elective federal officers, thereby depriving the individual plaintiff, as a qualified voter, of his right to hear all points of view regarding the qualifications of such candidates, including the views of corporations, national banks and labor unions.

(8) Whether 2 U. S. C. § 441b(a) violates the First Amendment to the Constitution because it prohibits the expenditure of corporate funds to publish or communicate to the electorate truthful statements concerning the qualification of specifically named candidates for election to federal offices when such expenditures are made "in connection with an election," or for the purpose of influencing the outcome of such elections.

SUBMITTED TO COURT OF APPEALS EN BANC.

APPENDIX C

ATHENS LUMBER COMPANY, INC.,
et al., Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,
et al., Defendants.

Civ. A. No. 81-79-ATH.

United States District Court,
M. D. Georgia,
Athens Division.

Feb. 9, 1982.

OWENS, Chief Judge:

On July 27, 1981, Athens Lumber Company, Incorporated, a Georgia corporation with its sole office and place of business in Athens, Georgia, and its president and stockholder, John P. Bondurant, as plaintiffs filed their complaint against defendants the Federal Election Commission and Attorney General William French Smith seeking a declaratory judgment finding 2 U.S.C. § 441b(a), to wit:

> "It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in

> connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowing to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section."

to be constitutionally invalid under the First and Fifth Amendments to the Constitution of the United States.

The complaint alleges that this court has jurisdiction under 28 U. S. C. § 1331,[1] the federal question jurisdictional statute, and 2 U. S. C. § 437h, a provision of the Federal Elections Campaign Act, which states:

> "Judicial review—Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to courts of appeals sitting en banc
>
> (a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality, of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc."

---

1. 28 U.S.C. § 1331 provides:

> "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Complainants seek a declaratory judgment as specially provided for in § 437h and as generally provided for in 28 U. S. C. § 2201 which states:

> "Creation of remedy
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

In their complaint the plaintiffs allege that Athens Lumber Company, Inc.—a manufacturer and seller of architectural millwork and seller of building materials—having been adversely affected in its business by policies, actions and laws of the United States, "desire[s] to exercise rights protected and guaranteed by the First and Fifth Amendments by assisting and promoting the election to federal offices of those persons whom the plaintiffs believe are best qualified to serve the interests of the people of the United States, and, by so doing, to promote the business and welfare of the Athens Lumber Company, Incorporated, its shareholders, customers and suppliers . . ." (Complaint, para. 7).

Plaintiffs further allege that all the plaintiff corporation's directors and shareholders—plaintiff John P. Bondurant, Mary B. Bondurant, J. P. Bondurant, III, Birdie Bondurant Clower and Emmet J. Bondurant, counsel for plaintiff—by unanimous action taken on July 23, 1981, have resolved that:

"1. The President of the Company is hereby authorized to expend a maximum of $10,000 through December 31, 1984 to support the election to national office of those persons whom he believes to be best qualified and who will best serve the people of the United States, and the interests of the Company, its employees, shareholders and customers; such candidates may include candidates for election to the United States House of Representatives, the United States Senate, and President or Vice President of the United States or member of the Electoral College to be nominated or elected at any primary, general or special election or political convention at which such candidates are to be nominated or elected held during 1981 through 1984.

"2. No contribution or other gift of money directly to a candidate or to a campaign of a candidate shall exceed $100 per candidate or campaign, without the prior approval of the Board of Directors.

"3. At least 50% of the fund shall be expended by the Company, independently of the campaign of any candidate for public office, on newspaper, radio, and television advertisements endorsing, promoting or opposing the election of specifically identified candidates to federal office.

"4. The President is authorized to include, at the expense of the Company, messages endorsing the positions of and urging the election of specifically identified candidates for federal office, in monthly statements regularly mailed by the Company to its customers and in letters mailed by the Company to its suppliers and persons whom the President may designate.

"5. No contributions or expenditures shall be made for political purposes, either from the special fund provided for in subparagraph 1 above, or from any other funds of the Company, until (a)2 U. S. C. § 441b(a) is either repealed or declared invalid by a court of competent jurisdiction, and (b) the Company

receives an opinion of counsel that the proposed expenditure or contribution does not violate any other valid provision of federal or state law, or any valid regulation of the Federal Election Commission or other regulatory agency.

"6. The President is hereby authorized to employ Trotter, Bondurant, Miller & Hishon to represent the Company and the President in bringing any appropriate suit on behalf of the Company under 2 U. S. C. § 437h(a), and such other statute as may be appropriate seeking a determination of the validity of 2 U. S. C. § 441b(a) by a court of competent jurisdiction." (Exhibit A to Complaint)

Complainants say that each form of political expression provided for by said resolution and that plaintiff corporation intends to engage in, will constitute a violation of 2 U.S.C. §441b(a). They further say that they "are afraid to exercise their rights to engage in any of the protected political activities authorized by the unanimous resolution . . . because of the threat and fear that defendants will attempt to enforce one or more of the sanctions . . . [provided for in 2 U. S. C. § 437g] against plaintiffs, thereby subjecting plaintiffs to the burden, expense and embarrassment of defending themselves and the potential risk of severe penalties in the event that the Act's restrictions are held to be valid." (Complaint, para. 13). This uncertainty, they further allege, deters them from exercising their First and Fifth Amendment constitutional rights and has caused and will continue to cause them to suffer irreparable harm. They contend that only a declaratory judgment invalidating § 441b(a) can cause this irreparable harm to cease.

Section 437g, 2 U.S.C., provides for civil enforcement by the Commission of the provision in question through

informal methods of conference, conciliation and persuasion, and authorizes the Commission to enter into a conciliation agreement. Under certain circumstances the agreement may require the payment of civil penalties. § 437g(a)(4) and (5). If the Commission is unable to enter into a conciliation agreement, it may institute a civil action in district court for injunctive relief and for imposition of a civil penalty not to exceed $5,000 or the amount of the contribution or expenditure. A showing of a knowing and wilful violation increases the possible civil penalty to the greater of $10,000 or 200% of the contribution or expenditure. § 437g(a)(6). Alternatively, the Commission, if it determines probable cause to believe a knowing and wilful violation of the Act has occurred, may refer the matter to the Attorney General. 437g(a)(5)(C).

Criminal penalties are specified in § 437g(d)(1) through (3), to wit:

> "(d)(1)(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.
>
> "(B) In the case of a knowing and willful violation of section 316(b)(3), the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 441b(b)(3) of this title may incorporate a violation of section 441c(b), 441f, or 441g of this title.

"(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

"(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of Title 26, any defendant may evidence their lack of knowledge or intent to commit the alledged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) of this section which specifically deals with the act or failure to act constituting such violation and which is still in effect.

"(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of Title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the concilation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement." (emphasis added)

As the underlined words indicate, criminal penalties are not imposed on § 441b(a) prohibited contributions or expenditures aggregating less than $2,000 during a calendar year.

In responding to the plaintiffs' complaint the defendant Attorney General moved the court to dismiss the plaintiffs' complaint "on the grounds that plaintiffs' complaint fails to set forth a justiciable case and controversy between defendant William French Smith and the plaintiffs." The defendant Federal Election Commission in its responsive pleadings as a first affirmative defense stated, "This court lacks subject matter jurisdiction over this action as there is no case or controversy, and 28 U.S.C. § 1331 and 2201 do not confer jurisdiction." Pursuant to this court's local rules each party has submitted its briefs of law on these motions and they are now ready for decision.

2 U.S.C. § 437h(a)

[1] From the outset plaintiffs have urged and later moved this court to immediately certify all questions of constitutionality in this case to the Eleventh Circuit Court of Appeals for an expediated *en banc* hearing pursuant to 2 U.S.C. § 437h(a) which provides:

> "The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. *The district court immediately shall certify all questions of constitutionality of this Act* to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." (emphasis added)

In doing so the plaintiffs in effect suggest that this district court, because of the mandate of § 437h(a) is required to immediately certify the constitutional questions

as framed by the plaintiffs to the Eleventh Circuit Court of Appeals sending with its certification the entire record of this case and leaving all questions including these motions to be decided by the court of appeals. Defendants urge this court to grant their motions to dismiss and thus find that there is no case or controversy to be certified to the court of appeals under § 437h or to be considered under 28 U.S.C. § 2201, the general declaratory judgment statute.

Section 437, 2 U.S.C. and 28 U.S.C. § 2201 confer jurisdiction upon the district courts for the filing of complaints or actions for declaratory judgement. Since 2 U.S.C. § 437h provides for certification to and expedited consideration by the court of appeals sitting *en banc* and for direct appeal to the Supreme Court of the United States, and since, on the other hand 28 U.S.C. § 2201 provides for the matter to proceed at a slower pace to conclusion and judgment in the district court and for appeal to the court of appeals but not for *en banc* consideration or for direct appeal to the Supreme Court, plaintiffs naturally prefer and stress the expeditious 2 U.S.C. § 437h procedure.

The question of whether or not these plaintiffs have standing to invoke the expeditious procedure of 2 U.S.C. § 437h has been argued only by the Federal Election Commission.[2] As suggested by the Commission, the court notes that § 437h states, "The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions . . ." Since

---

2. By letter dated February 10, 1982, from the Department of Justice, the court was advised that both defendants take the same position.

the plaintiff corporation is ineligible to vote and not otherwise described as a proper party, it seems to this court that § 437h's expedited procedures are not available to the plaintiff coropration. On the other hand, John P. Bondurant, corporate president, stockholder and director, is an individual eligible to vote and thus possibly a proper party to a § 437h action.

In *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) the Supreme Court carefully and at great length considered the constitutionality of virtually every portion of the Federal Elections Campaign Act except 2 U.S.C. § 437 and its subparts, including § 437h. The Court sustained the constitutional validity of the Act's individual contribution limits, disclosure and reporting provisions and public financing scheme, but found the Act's limitations on campaign expenditures, on independent expenditures by individuals and groups and on expenditures by a candidate from his personal funds to all be constitutionally infirm. Mr. Bondurant, as an individual, is thus free to independently expend his personal funds, including dividends from the corporate plaintiff, without limitation. His only possible interest as an individual in this action must then necessarily be in using corporate funds on which corporate income taxes have been paid, but on which the additional personal income taxes due on corporate dividends have not been paid, for political expenditure purposes. Since such expenditures would be solely by the coropration, it further seems that only the corporation is the real party in interest and the only proper party to prospectively attack the prohibitions of 2 U.S.C. § 441b(a); its only available procedure since corporations are not encompassed by § 437h is the non-

expedited 28 U.S.C. § 2201 declaratory judgment provision.

In considering defendants' motions to dismiss based upon defendants' contention that the plaintiffs' complaint fails to set forth a justiciable case or controversy between the plaintiffs and the defendants, it is unnecessary to decide whether or not the expeditious § 437h declaratory judgment procedure and/or the 28 U.S.C. § 2201 declaratory judgment procedure is available to these plaintiffs since both procedures require this court to find an Article III justiciable case or controversy between the plaintiffs and the defendants for the case to be within this court's jurisdiction.

In *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) which, as already mentioned, involved a § 437h challenge to the greater part of the Act excepting only § 441 and its subparts, the Supreme Court first considered whether or not an Article III justiciable case or controversy existed. In doing so the Court said:

> "At the outset we must determine whether the case before us presents a 'case or controversy' within the meaning of Art. III of the Constitution. Congress may not, of course, require this Court to render opinions in matters which are not 'cases or controversies.' *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241, 81 L.Ed. 617, 57 S.Ct. 461 [463-464], 108 ALR 1000 (1937). We must therefore decide whether appellants have the 'personal stake in the outcome of the controversy' necessary to meet the requirements of Art. III. *Baker v. Carr*, 369 U.S. 186, 204, 7 L.Ed.2d 663, 82 S.Ct. 691 [703] (1962). *It is clear that Congress, in enacting 2 U.S.C. § 437h* (1970 ed. Supp. IV) [2 U.S.C.S. § 437h], *intended to provide judicial review to the extent permitted by*

> *Art. III.* In our view, the complaint in this case demonstrates that at least some of the appellants have a sufficient 'personal stake' in a determination of the constitutional validity of each of the challenged provisions to present 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' *Aetna Life Ins. Co. v. Haworth, supra,* at 241, 81 L.Ed. 617, 57 S.Ct. 461 [at 464], 108 A.L.R. 1000." 424 U.S. 1 at 11, 96 S.Ct. 612 at 631, 46 L.Ed.2d 683 (1976).

and in footnote 11 answered one of the questions certified by the court of appeals as follows:

> "Does the first sentence of § 315(a) of the Federal Election Campaign Act, as amended, 2 U.S.C. § 437h(a) (1970 ed. Supp. IV), [2 U.S.C.S. § 437h(a)], in the context of this action, require courts of the United States to render advisory opinions in violation of the 'case or controversy' requirement of Article III, § 2, of the Constitution of the United States? NO."

Aetna Life Ins. Co. v. Haworth, supra, decided in 1936, discussed the "case or controversy" requirement as applied to actions for a declaratory judgment. There the Court said:

> "First.—The Constitution limits the exercise of the judicial power to 'cases' and 'controversies.' 'The term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter, and includes only suits of a civil nature.' Per Mr. Justice Field in *Re Pacific R. Commission* (C. C.) 12 Sawy, 559, 32 F. 241, 255, citing *Chisholm v. Georgia,* 2 Dall. 431, 432, 1 L.Ed. 445, 446. See *Muskrat v. United States,* 219 U.S. 346, 356, 357, 55 L.Ed. 246, 250, 251, 31 S.Ct. 250 [253, 254]; *Old Colony Trust Co. v. Commissioner of Internal Revenue,*

279 U.S. 716, 723, 724, 73 L.Ed. 918, 925, 926, 49 S.Ct. 499 [501, 502]. The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word 'actual' is one of emphasis rather than of definition. Thus the operation of the Declaratory Judgment Act is procedural only. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish. *Turner v. Bank of North America,* 4 Dall. 8, 10, 1 L.Ed. 718, 719; *Stevenson v. Fain,* 195 U.S. 165, 167, 49 L.Ed. 142, 143, 25 S.Ct. 1 [6, 7]; *Kline v. Burke Constr. Co.,* 260 U.S. 226, 234, 67 L.Ed. 226, 232, 43 S.Ct. 79 [82], 24 A.L.R. 1077. Exercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies. The judiciary clause of the Constitution 'did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts.' *Nashville, C. & St. L. R. Co. v. Wallace,* 288 U.S. 249, 264, 77 L.Ed. 730, 733, 53 S.Ct. 345 [348], 87 A.L.R. 1191. In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict. The Declaratory Judgment Act must be deemed to fall within this ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends.

"A 'controversy' in this sense must be one that is appropriate for judicial determination. *Osborn v. Bank of United States,* 9 Wheat. 738, 819, 6 L.Ed. 204, 223. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical

or abstract character; from one that is academic or moot. *United States v. Alaska S. S. Co.*, 253 U.S. 113, 116, 64 L.Ed. 808, 809, 40 S.Ct. 448. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. *South Spring Hill Gold Min. Co. v. Amador Medean Gold Co.*, 145 U.S. 300, 301, 36 L.Ed. 712, 713, 12 S.Ct. 921; *Fairchild v. Hughes*, 258 U.S. 126, 129, 66 L.Ed. 499, 504, 42 S.Ct. 274 [275]; *Massachusetss v. Mellon*, 262 U.S. 447, 487, 488, 67 L.Ed. 1078, 1085, 43 S.Ct. 597 [601]. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts . . . . Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. *Nashville, C. & St. L.R. Co. v. Wallace*, supra (288 U.S. p. 263, 77 L.Ed. 735, 53 S.Ct. 345 [348], 87 A.L.R. 1191; *Tutun v. United States*, 270 U.S. 568, 576, 577, 70 L.Ed. 738, 741, 742, 46 S.Ct. 425 [426]; *Fidelity Nat. Bank & T. Co. v. Swope*, 274 U.S. 123, 132, 71 L.Ed. 959, 964, 47 S.Ct. 511 [514]; *Old Colony Trust Co. v. Commissioner of Internal Revenue, supra* (279 U.S. p. 725, 78 L.Ed. 926, 49 S.Ct. 499 [502]). And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required. *Nashville, C. & St. L. R. Co. v. Wallace*, supra, 288 U.S. 264, 77 L.Ed. 736, 53 S.Ct. 345 [348], 87 A.L.R. 1191."

The Court in finding the existence of a justiciable controversy considered "the nature of the controversy, the relation and interests of the parties, and the relief sought . . ." *Id.*

What is the nature of their controversy?

As defendants point out, the plaintiff family closely held corporation has resolved to expend corporate funds for purposes prohibited by 2 U.S.C. § 441b(a) but has directed that no such expenditures be made until "2 U.S.C. § 441b(a) is either repealed or declared invalid by a court of competent jurisdiction, and (b) the Company receives an opinion of counsel that the proposed expenditure or contribution does not violate any other valid provision of federal or state law, or any valid regulation of the Federal Election Commission or other regulatory agency." (Exhibit A, para. 5). Defendants say that plaintiffs have done nothing more than create a hypothetical situation with the hope that the courts of these United States will render an advisory opinion on their proposed course of conduct.

Plaintiffs citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) assert that the plaintiff corporation has standing to attack § 441b(a) because its intentions are to expend corporate funds and its exposure to civil and criminal sanctions is equal to those of *First National Bank of Boston* which the Supreme Court found adequate to give the bank standing on First Amendment grounds to challenge a Massachusetts election law prohibiting corporate speech. Unfortunately for this court the Supreme Court in *First National Bank of Boston v. Bellotti* did not discuss the question of whether or not a justicable controversy existed. On the other hand, the Court in deciding that the election that the bank desired to speak about having been held did not moot the case, did observe:

"Nor can there be any serious doubt that there is a 'reasonable expectation,' *Weinstein v. Bradford*, supra [423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350], that appellants again will be subject to the *threat of prosecution under § 8*. The 1976 election marked the fourth time in recent years that a proposed graduated income tax amendment has been submitted to the Massachusetts voters. Appellee's suggestion that the legislature may abandon its quest for a constitutional amendment is purely speculative. Appellants insist that they will continue to oppose the constitutional amendment, and *there is no reason to believe that the Attorney General will refrain from prosecuting violations of § 8*. Compare *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 546-547, 49 L.Ed.2d 683, 96 S.Ct. 2791 [2796-2797] (1976), with *Spomer v. Littleton*, 414 U.S. 514, 521, 38 L.Ed.2d 694, 94 S.Ct. 685 [689] (1974).

"Meanwhile, § 8 remains on the books as a complete prohibition of corporate expenditures related to individual tax referenda, and as a restraining influence on corporate expenditures concerning other ballot questions. *The criminal penalties of § 8 discourage challenge by violation*, and the effect of the statute on arguably protected speech will persist. *Storer v. Brown*, 415 U.S. 724, 737 n.8, 39 L.Ed.2d 714, 94 S.Ct. 1274 [1282 n.8] (1974); see *American Party of Texas v. White*, 415 U.S. 767, 770 n.1, 39 L.Ed.2d 744, 94 S.Ct. 1296 [1301 n.1] (1974); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5, 36 L.Ed.2d 1, 93 S.Ct. 1245 [1249 n.5] (1973); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2, 31 L.Ed.2d 274, 92 S.Ct. 995 [998 n.2] (1972). Accordingly, we conclude that this case is not moot and proceed to address the merits." 435 U.S. at 774, 55 L.Ed.2d at 716, 98 S.Ct. at 1415. (emphasis added).

thereby intimating that the certainty of future criminal prosecution discourages constitutional challenge by violation of the statute and creates a justiciable controversy.

[2] Unlike the criminal statute that created an ongoing threat of prosecution in *First National Bank of Boston v. Bellotti*, the Act that these plaintiffs seek to attack on constitutional grounds contains both civil and criminal sanctions and, as already pointed out, its criminal sanctions for violation of § 441b(a) do not apply on corporate contributions or expenditures aggregation less than $2,000.00 during a calendar year. § 437g(d)(1) through (3). Unlike the First National Bank of Boston and its officers and directors, the Athens Lumber Company, Inc., its president, John P. Bondurant, and its officers and directors can expend less than $2,000 of corporate funds during a calendar year for the purposes prohibited by § 441b(a), expose themselves only to possible civil penalties and create a real controversy with the defendant Federal Election Commission and, assuming the Commission refers the violation to the Attorney General, also with the Attorney General. *First National Bank of Boston v. Bellotti* does not therefore require a finding of a justiciable case or controversy in this case.

What determines the existence or non-existence of a justiciable case or controversy in a case like this where plaintiffs, because of anticipated misconduct, seek to institute a First Amendment constitutional challenge? A concise summary of the law on this question is found in *International Society for Krishna Consciousness v. Eaves*, 601 F.2d 809 (5th Cir. 1979), at 817:

> "Justiciability is a notably amorphous notion, 'a concept of uncertain meaning and scope.' *Flast v. Cohen*, 392 U.S. 83, 95, 88 S.Ct. 1942, 1950, 20 L.Ed.2d 947 (1968). It has at least two distinct components. One is jurisdictional, the Article III requirement that

federal courts decide only 'cases' and 'controversies.' The other consists of 'policy considerations,' id. at 97, 88 S.Ct. 1942 [at 1951], not specified in the Constitution but bearing on whether it is appropriate to permit a particular case to be litigated in a federal court at a particular time. See generally *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588-89, 92 S.Ct. 1716 [1719-20], 32 L.Ed.2d 317 (1972). This component is 'not always clearly distinguished from the constitutional limitation.' See *Barrows v. Jackson*, 346 U.S. 249, 255, 73 S.Ct. 1031, 1034, 97 L.Ed. 1586 (1953).

"The constitutional requirement of a case or controversy is rooted in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). It is an especially crucial limit on the power of a federal court faced with an anticipatory challenge like appellants'. 'The power and duty of the judiciary is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision . . . . *Marbury v. Madison* . . . . But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws . . . .' *Younger v. Harris*, 401 U.S. 37, 52, 91 S.Ct. 746, 754, 27 L.Ed.2d 669 (1971); see *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11, 93 S.Ct. 2908 [2914-15], 37 L.Ed.2d 830 (1973); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60 (1803). In other words, a plaintiff must not be allowed to enlist the aid of a federal court in a general effort to purge unconstitutional measures from the body of the law. See, e.g., *United States v. Richardson*, 418 U.S. 166, 173, 94 S.Ct. 2940 [2944], 41 L.Ed.2d 678 (1974); *Boyle v. Landry*, 401 U.S. 77, 81, 91 S.Ct. 758 [760], 27 L.Ed.2d 696 (1971). To say this is not by any means to suggest that we should be hostile to anticipatory challenges; they play a most vital role in modern efforts to enforce constitutional rights. 'It is not necessary that [a party] first expose himself to actual arrest or prosecution to be en-

titled to challenge a statute that he claims deters the exercise of his constitutional rights.' *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1216, 39 L.Ed.2d 505 (1974). But the premise of *Marbury v. Madison* requires us to insist that an anticipatory challenge to statute's constitutionality grow out of a 'real, substantial controversy between parties . . . a dispute definite and concrete.' *Babbitt v. UFW*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979), quoting *Railway Mail Association v. Corsi*, 326 U.S. 88, 93, 65 S.Ct. 1483 [1487], 89 L.Ed. 2072 (1945).

"In deciding whether such a dispute exists, courts have traditionally focused on each of the parties in turn. They have asked whether the plaintiff is seriously interested in disobeying, and the defendant seriously intent on enforcing, the challenged measure. Some courts have held that no case or controversy exists if either of these elements is missing. See, e.g. *Rincon Bank of Mission Indians v. County of San Diego*, 495 F.2d 1, 4-6 (9th Cir.), cert. denied, 419 U.S. 1008, 95 S.Ct. 328, 42 L.Ed.2d 283 (1974). But we think the second aspect of this inquiry—focusing on the probability of enforcement—is relevant only to the non-jurisdictional, 'policy considerations' underlying justiciability and not to the existence of a case or controversy. There are, to be sure, several important reasons for insisting on some significant likelihood that the defendant government will enforce the statute if it is violated. A defendant uninterested in enforcing a statute is less likely to provide a vigorous defense of its constitutionality, see generally *Poe v. Ullman*, 367 U.S. 497, 501-02, 81 S.Ct. 1752 [1754-55], 6 L.Ed.2d 989 (1961) (plurality opinion); see also *Singleton v. Wulff*, 428 U.S. 106, 114 96 S.Ct. 2868, 2874, 49 L.Ed.2d 826 (1975); prosecutors should be permitted, and perhaps encouraged, to refuse to enforce unconstitutional laws, see e.g., *Ex parte La Prade*, 289 U.S. 444, 458-59, 53 S.Ct. 682 [685-86], 77 L.Ed. 1311 (1933); see also *Spomer v. Littleton*,

414 U.S. 514, 94 S.Ct. 685, 38 L.Ed.2d 694 (1974); and for related educative reasons, challenges to laws that have fallen into disuse should be directed to the political branches, with the judiciary intervening only after the other branches reexamine and reaffirm such measures by resuming enforcement. But these do not appear to be jurisdictional arguments; they do not speak to the concerns of the premise derived from *Marbury v. Madison*.[6] Indeed there is clear Supreme Court authority that the probability of enforcement is not relevant to a court's jurisdiction over an anticipatory challenge. *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968), was an appeal of right under 28 U.S.C. § 1257(2) from a state court's dismissal of an anticipatory challenge. The statute under attack prohibited public school teachers from teaching evolution. The Court noted that '[t]here is no record of any prosecutions in Arkansas under its statute. It is possible that the statute is presently more a curiosity than a vital fact of life . . . .' Id. at 101-02, 89 S.Ct. at 269. Nevertheless, the Court accepted jurisdiction and—apparently believing that § 1257(2) required it to decide all appeals of which it had jurisdiction and precluded it from denying review for 'policy' reasons—reversed on the merits. The Supreme Court, like every federal court, is of course limited by Article III. Thus *Epperson* implicitly holds that the probability of a statute's being enforced, however important it is to the nonjurisdictional, 'policy' component of justiciability, is not relevant to whether an anticipatory challenge presents a case or controversy sufficient to establish federal jurisdiction.

"When we decide whether a case or controversy exists, then, we must focus on the plaintiff's interest in 'engag[ing] in a course of conduct, arguably affected with a constitutional interest, but proscribed by a statute.' *Babbitt v. UFW*, 442 U.S. 289, 303, 99 S.Ct. 2301, 2309, 60 L.Ed.2d 895 (1979). While many varieties of plaintiffs can qualify to raise anticipa-

tory claims, see e.g., *Doran v. Salem Inn*, 422 U.S. 933, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975); *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), the Supreme Court has been most willing to allow anticipatory claims by plaintiffs who allege that they wish to violate the challenged statute because of their active membership in some profession or organization that has goals apart from the extirpation of unconstitutional measures. Compare *Babbit v. UFW*, 442 U.S. 289, 300-01, 99 S.Ct. 2301, 2309-10, 60 L.Ed.2d 895 (1979); *Buckley v. Valeo*, 424 U.S. 1, 7-8, 12 & n. 10, 96 S.Ct. 612 [629, 631 & n. 10], 46 L.Ed.2d 659 (1976); *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 551-53, 93 S.Ct. 2880 [2883-84], 37 L.Ed. 2d 796 (1973) (decided on merits without discussing jurisdiction); *Doe v. Bolton*, 410 U.S. 179, 188, 93 S. Ct. 739 [745], 35 L.Ed.2d 201 (1973); *Lake Carriers' Association v. MacMullan*, 406 U.S. 498, 506-07, 92 S.Ct. 1749 [1755], 32 L.Ed.2d 257 (1972); and *Epperson v. Arkansas*, 393 U.S. 97, 100-02, 89 S.Ct. 266 [268-69], 21 L.Ed.2d 228 (1968), with *Steffel v. Thompson*, 415 U.S. 452, 459-60, 94 S.Ct. 1209 [1215-16], 39 L.Ed. 2d 505 (1974), and *Golden v. Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969). See *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) (plaintiff's long-standing concern with issue, by itself, is insufficient to confer jurisdiction). The Court has never been explicit about this practice, but the reasons for it are clear. If we are to be faithful to the premise derived from *Marbury v. Madison*, we cannot always be satisfied by a plaintiff's formal allegation that he wishes to violate the challenged statute, for such an allegation could be honestly made by a plaintiff interested only in sweeping unconstitutional legislation from the statute books. See generally *Laird v. Tatum*, 408 U.S. 1, 13-15, 92 S.Ct. 2318 [2325-26], 33 L.Ed.2d 154 (1972). We can be most certain that a constitutional challenge grows out of a genuine dispute—and is not a contrivance prompted solely by

a desire to enforce constitutional rights—if we know that the alleged unconstitutional statute interferes with the way the plaintiff would normally conduct his affairs. Of course anticipatory challenges should be allowed in a variety of other circumstances. But usually it is sufficient, although not necessary, that the plaintiff have a role in an organization dedicated in part to activities proscribed by the challenged statute and assertedly protected by the Constitution."

---

[6]The probability of enforcement seems relevant to these concerns in only one way. If there is no serious possibility that a statute will be enforced against him, a plaintiff with a genuine independent interest in acting in the way it proscribes will probably do so. A plaintiff who does not act but instead challenges its constitutionality is, therefore, more likely to be raising the constitutional claim simply because he wants to enforce his constitutional rights, not for reasons connected to any genuine concrete dispute. The premise of *Marbury v. Madison*, of course, does not permit a constitutional claim to be raised in this fashion. But any probability of enforcement, however small, may deter even a genuinely interested plaintiff. And a conscientious citizen may be unwilling to break any law that has not been repealed or invalidated, even if he believes it to be unconstitutional.

[3] Focusing on the interest of plaintiff Athens Lumber Company, Inc. and its plaintiff president in "engag[ing] in a course of conduct, arguably affected with a constitutional interest, but proscribed by a statute . . .," *Babbit v. Farm Workers*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2309, 60 L.Ed.2d 895, 906 (1979), it is obvious that the statute under attack in no way interferes with the way that the plaintiff corporation through its plaintiff president conducts its corporate affairs—its business of manufacturing and selling architectural millwork and of selling building materials. These plaintiffs do not even allege that corporately they have a role in any organization that is dedicated in whole or in part to activities prohib-

ited by § 441b(a) and allegedly protected by the First and Fifth Amendments. Considering the absence of such possible interference in the normal affairs of this corporation, it is difficult to perceive how plaintiffs' complaint is anything more than an effort "to enlist the aid of [this] federal court in a general effort to purge unconstitutional measures from the law."

As the quoted portion of *International Society for Krishna Consciousness v. Eaves* reminds us,

> "The power and duty of the judiciary is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision. . . . *Marbury v. Madison*. . . . But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws. . . ." *Younger v. Harris*, 401 U.S. 37, 52, 91 S.Ct. 746, 754, 27 L.Ed.2d 669 (1971); see *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11, 93 S.Ct. 2908 [2914-15], 37 L.Ed.2d 830 (1973); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60 (1803).

There being an absence of such a concrete dispute between these plaintiffs and these defendants, the justiciable case or controversy that must exist for this court to have jurisdiction of this complaint is totally lacking, because of which defendants' motions to dismiss must be granted. To hold otherwise would put this court in the position of rendering advisory opinions in violation of Article III's "case or controversy" requirement.

Defendants' motions to dismiss are therefore GRANTED.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 82-8102

D. C. Docket No. C-81-79-ATH

ATHENS LUMBER COMPANY INCORPORATED, JOHN P. BONDURANT,

Plaintiffs-Appellants,

versus

FEDERAL ELECTION COMMISSION AND WILLIAM FRENCH SMITH, in his official capacity as Attorney General of the United States,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Georgia

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT and CLARK, Circuit Judges.*

JUDGMENT ON REHEARING EN BANC

Issued as mandate: Nov. 21, 1983.

This cause came on to be heard on rehearing en banc and was argued by counsel;

---

*Judge Anderson is recused and did not participate in this decision.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the standing as found by the panel opinion is found by this en banc court; and that the judgment of the said District Court is hereby, REVERSED; and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

October 24, 1983

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
EN BANC

CASE NO. 82-8102

ATHENS LUMBER COMPANY, INC.
and JOHN P. BONDURANT,

Appellants,

v.

FEDEDAL ELECTION COMMISSION,
et al.,

Appellees.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

(Filed Oct. 28, 1983)

Notice is hereby given that Athens Lumber Company, Incorporated and John P. Bondurant (collectively "Appellants") hereby appeal to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the Eleventh Circuit En Banc rendered on October 24, 1983. Appellants will seek review of that portion of the Court's judgment upholding the constitutionality of 2 U.S.C. § 441b in light of the challenge asserted by these Appellants pursuant to 2 U.S.C. § 437h.

This appeal is taken pursuant to 2 U.S.C. § 437h(b).

This 28th day of October, 1983.

/s/ Emmet J. Bondurant

/s/ Jeffrey O. Bramlett

BONDURANT, MILLER, HISHON & STEPHENSON
2200 First Atlanta Tower
Two Peachtree Street, N.W.
Atlanta, Georgia 30383
(404) 581-5200
Attorneys for Plaintiffs-Appellants
Athens Lumber Company, Incorporated
and John P. Bondurant

APPENDIX F

ACTION BY UNANIMOUS CONSENT OF THE SHAREHOLDERS OF ATHENS LUMBER COMPANY, INCORPORATED

The undersigned, being all of the shareholders of Athens Lumber Company, Incorporated (hereinafter referred to as the "Company"), acting pursuant to Georgia Code § 22-603(d), hereby unanimously consent to the following actions being taken and the following resolutions being adopted without a meeting, and hereby direct that this written consent be filed in the minutes of the Company:

WHEREAS, Athens Lumber Company, Incorporated, its employees, shareholders and customers are each taxpayers and beneficiaries of services provided by the Government of the United States; and

WHEREAS, much of the legislation passed by Congress has had a direct and in many instances adverse effect on the economy of the United States in general, and on the lumber and construction industries in particular, which has, in turn, had a direct and adverse effect upon the business of the Company and upon the jobs of its employees and the businesses of its suppliers and customers; and

WHEREAS, the Company is the subject of extensive, and in many cases excessive, burdensome and unnecessary regulation by the United States and various federal agencies; and

WHEREAS, the Company has a direct economic interest in the election to public office of persons who support legislation that will promote the free enterprise system, promote the economic development of the lumber and construction industries, require fiscal responsibility by the federal government, reduce and

control inflation, eliminate overregulation of business, control administrative agencies and make government agencies and employees more accountable for abuses of their official powers and positions; and

WHEREAS, the Company, its employees, shareholders and customers have a direct and substantial interest in insuring that the best qualified persons are encouraged to run for and be elected to public office; and

WHEREAS, the Board of Directors and shareholders of the Company believe that it is in the best interest of the Company, its employees, shareholders and customers for the Company to support the election of the best qualified candidates to public office in the federal government, by making contributions of $1,000 or less to those candidates for federal offices whom the management of the Company believes to be best qualified to serve the needs of the United States, the Company, its employees, shareholders and customers, and by making expenditures of funds of the Company, independent of the campaigns of any candidates, to purchase newspaper, television or radio advertisements or to pay the cost of direct mail to customers and suppliers endorsing and publicizing the positions of specifically identified candidates for federal office whose positions on matters of public policy the Company either supports or opposes, and urging the voters either to elect or defeat those candidates; and

WHEREAS, the Board of Directors and shareholders of the Company believe that Athens Lumber Company, Incorporated, is legally entitled under the First Amendment to engage in each form of political activity described above on an equal basis with natural persons and many other organizations; and

WHEREAS, the provisions of the Federal Election Campaign Act, 2 U.S.C. § 44lb(a), prohibit all corporations, including Athens Lumber Company, In-

corporated, from making any contributions or expenditures in connection with any election to federal office; and other statutes provide severe penalties for violations of § 441b(a), including so-called "civil penalties" of up to $10,000 or 200% of the amount of "the contribution or expenditure" in a suit by the Federal Election Commission (2 U.S.C. § 437g(a)(6)(C)), or a fine of $25,000 or 300% of the contribution or expenditure in a criminal prosecution brought by the Department of Justice (2 U.S.C. § 437g(d)(1)(A)), and

WHEREAS the Board of Directors and shareholders of the Company believe that it is in the best interest of the Company, its employees, shareholders and customers for the Company to exercise its rights guaranteed by the First Amendment to make contributions to candidates for elective federal offices and to make expenditures to promote the election or defeat of specifically identified candidates to those offices, but the Board of Directors is afraid for the Company to exercise such rights until the constitutionality of 2 U.S.C. §441b(a) has been determined; and

WHEREAS, the Board of Directors and shareholders desire to authorize the Company to expend money for political purposes and to authorize counsel to institute a suit on behalf of the Company in the United States District Court for that purpose,

NOW, THEREFORE, BE IT RESOLVED THAT:

1. The President of the Company is hereby authorized to expend a maximum of $10,000 through December 31, 1984 to support the election to national office of those persons whom he believes to be best qualified and who will best serve the people of the United States, and the interests of the Company, its employees, shareholders and customers; such candidates may include candidates for election to the United States House of Representatives, the United

States Senate, and President or Vice President of the United States or member of the Electoral College to be nominated or elected at any primary, general or special election or political convention at which such candidates are to be nominated or elected held during 1981 through 1984.

2. No contribution or other gift of money directly to a candidate or to a campaign of a candidate shall exceed $100 per candidate or campaign, without the prior approval of the Board of Directors.

3. At least 50% of the fund shall be expended by the Company, independently of the campaign of any candidate for public office, on newspaper, radio, and television advertisements endorsing, promoting or opposing the election of specifically identified candidates to federal office.

4. The President is authorized to include, at the expense of the Company, messages endorsing the positions of and urging the election of specifically identified candidates for federal office, in monthly statements regularly mailed by the Company to its customers and in letters mailed by the Company to its suppliers and persons whom the President may designate.

5. No contributions or expenditures shall be made for political purposes, either from the special fund provided for in subparagraph 1 above, or from any other funds of the Company, until (a) 2 U.S.C. § 441b(a) is either repealed or declared invalid by a court of competent jurisdiction, and (b) the Company receives an opinion of counsel that the proposed expenditure or contribution does not violate any other valid provision of federal or state law, or any valid regulation of the Federal Election Commission or other regulatory agency.

6. The President is hereby authorized to employ Trotter, Bondurant, Miller & Hishon to represent the Company and the President in bringing any

appropriate suit on behalf of the Company under 2 U.S.C. § 437h(a), and such other statute as may be appropriate seeking a determination of the validity of 2 U.S.C. § 441b(a) by a court of competent jurisdiction.

IN WITNESS WHEREOF, the undersigned shareholders of the Corporation hereby affix their respective signatures, this 23rd day of July, 1981.

/s/ John P. Bondurant*

/s/ Mary B. Bondurant

/s/ J. P. Bondurant III

/s/ Birdie Bondurant Clower

/s/ Emmet J. Bondurant

*Individually and under proxy granted by Mary Bondurant Warren.

Office - Supreme Court, U.S
FILED
FEB 22 1984
R L. STEVAS
CLERK

No. 83-1190

In the Supreme Court of the United States

OCTOBER TERM, 1983

ATHENS LUMBER COMPANY, INCORPORATED,
AND
JOHN P. BONDURANT, APPELLANTS,

v.

FEDERAL ELECTION COMMISSION, ET AL., APPELLEES.

On Appeal From the United States Court of Appeals
For the Eleventh Circuit

MOTION TO DISMISS OR AFFIRM

CHARLES N. STEELE*
General Counsel
RICHARD B. BADER
Assistant General Counsel
JONATHAN A. BERNSTEIN
Attorney
FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4143

*Counsel of Record

FEBRUARY 22, 1984

QUESTIONS PRESENTED

(1) Whether the Court has obligatory jurisdiction of this case under the direct and expedited appeal provisions of 2 U.S.C. § 437h(b), when the district court did not certify constitutional questions to the *en banc* court of appeals pursuant to 2 U.S.C. § 437h(a), and the *en banc* court expressly stated that it had taken and decided the case under Fed. R. App. P. 35 and not under 2 U.S.C. § 437h(a).

(2) Whether the *en banc* court of appeals correctly concluded that it was bound by this Court's unanimous decision in *FEC* v. *National Right to Work Committee*, 459 U.S. ____, 103 S. Ct. 552 (1982), to uphold the constitutionality of Congress's longstanding prohibition of corporate contributions and expenditures in connection with federal elections, 2 U.S.C. § 441b.*

*The parties to this case are:
John P. Bondurant
Athens Lumber Company, Inc.
Federal Election Commission
William French Smith, in his official capacity as Attorney General of the United States

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
DECISIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	5
CONCLUSION	11
APPENDIX A	1a
APPENDIX B	5a

TABLE OF AUTHORITIES

Cases:

Bread Political Action Committee v. *FEC*, 455 U.S. 577 (1982)	6
Broadrick v. *Oklahoma*, 413 U.S. 601 (1973)	11
Buckley v. *Valeo*, 424 U.S. 1 (1976)	8
California Medical Association v. *FEC*, 453 U.S. 182 (1981)	6, 10
Democratic Party of the United States v. *National Conservative Political Action Committee*, ___ F. Supp. ___ (E.D. Pa. Dec. 12, 1983)	9
FEC v. *Lance*, 617 F.2d 365 (5th Cir. 1980), *aff'd*, 635 F.2d 1132 (5th Cir.) (en banc), *appeal dismissed and cert. denied*, 453 U.S. 917 (1981)	7

Cases—Continued Page

FEC v. *National Right To Work Committee*, 501 F. Supp. 422 (D.D.C. 1980), *rev'd*, 665 F.2d 371 (D.C. Cir. 1981), *rev'd*, 459 U.S. ____, 103 S. Ct. 552 (Dec. 13, 1982) ..*passim*

First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978) 9

Gifford v. *Tiernan*, 670 F.2d 882 (9th Cir.), *appeal dismissed and cert. denied*, 459 U.S. 804 (1982) 7

Pipefitters v. *United States*, 407 U.S. 385 (1972) 8

Statutes

2 U.S.C. § 437h .....*passim*
§ 437h(a) .....*passim*
§ 437h(b) .....*passim*
§ 441b .....*passim*
§ 441b(a) 2, 7
§ 441b(b)(2)(C) 8, 9
§ 441b(b)(4)(C) 8
28 U.S.C. § 1254(1) 2, 7
§ 2103 2

Miscellaneous

United States Constitution, Article III 1, 3
First Amendment 3, 4, 8
Fifth Amendment 3, 4, 8
11th Cir. R. 26 (k) 5
Fed. R. App. P. 35 .....*passim*
Sup. Ct. R. 16.1(a) 1
Sup. Ct. R. 16.1(c) 1, 5
Sup. Ct. R. 17 7
Sup. Ct. R. 17.1(c) 5, 8

No. 83-1190

In the Supreme Court of the United States

OCTOBER TERM, 1983

ATHENS LUMBER COMPANY, INCORPORATED,
AND
JOHN P. BONDURANT, APPELLANTS,

v.

FEDERAL ELECTION COMMISSION, et al., APPELLEES.

On Appeal From the United States Court of Appeals
For the Eleventh Circuit

MOTION TO DISMISS OR AFFIRM

The appellee Federal Election Commission respectfully moves the Court to dismiss the appeal for lack of jurisdiction, or, alternatively, to affirm the judgment of the United States Court of Appeals for the Eleventh Circuit as correctly decided, and not requiring further argument. Sup. Ct. R. 16.1(a), (c).[1]

DECISIONS BELOW

The district court decision dismissing the case for lack of a "case or controversy" under Article III, is reported at 531 F. Supp. 756 (M.D. Ga. 1982), and is reproduced at Jurisdictional Statement Appendix ("J.S.

---

[1] If the Court dismisses the appeal, and construes appellants' jurisdictional statement as a petition for certiorari, the Commission requests that the Court deny the petition because no sufficiently important questions are presented to warrant this Court's review.

App.") 26-48. The court of appeals panel decision, reversing the dismissal and submitting certified questions to the *en banc* court, is reported at 689 F.2d 1006 (11th Cir. 1982), and is reproduced at J.S. App. 3-25. The *en banc* court's order determining to rehear the entire case *en banc* under Fed. R. App. P. 35, is not reported, but is reproduced in App. A, *infra*. The court of appeals' *en banc* decision, finding 2 U.S.C. § 441b to be constitutional, is reported at 718 F.2d 363 (11th Cir. 1983), and is reproduced at J.S. App. 1-2.

JURISDICTION

On October 24, 1983, the court of appeals *en banc* rendered a decision summarily rejecting a constitutional attack on 2 U.S.C. § 441b(a), which prohibits corporate contributions or expenditures in connection with federal elections. The court grounded its decision to hear the matter *en banc* in its discretionary power under Rule 35, Fed. R. App. P.[2] This Court does not, therefore, have appellate jurisdiction of this matter pursuant to 2 U.S.C. § 437h(b), but, rather, may deem appellants' jurisdictional statement as a petition for a writ of certiorari, *see* 28 U.S.C. § 2103, and may exercise jurisdiction to review the decision of the court of appeals pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

2 U.S.C. § 437h provides:

> (a) *Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to*

---

[2] Fed. R. App. P. 35 provides in part:

> (a) When Hearing or Rehearing in Banc Will Be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except ... when the proceeding involves a question of exceptional importance.

courts of appeals sitting en banc. The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

(b) *Appeal to Supreme Court; time for appeal.* Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

(c) *Advancement on appellate docket and expedited disposition of certified questions.* It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section.

2 U.S.C. § 441b is reproduced in App. B, *infra*.

STATEMENT OF THE CASE

Appellants John Bondurant and Athens Lumber Co., Inc., the closely-held corporation of which he is president, brought suit in district court under 2 U.S.C. § 437h, seeking a declaratory judgment that 2 U.S.C. § 441b, prohibiting corporate contributions or expenditures in connection with federal elections, is unconstitutional under the first and fifth amendments.

The district court found that the suit did not involve a "case or controversy" sufficient to support federal jurisdiction under Article III of the Constitution. Accord-

ingly, the district court refused to certify constitutional questions to the court of appeals for *en banc* consideration under 2 U.S.C. § 437h(a), and dismissed the case. (J.S. App. 33-34, 48).

A panel of the court of appeals reversed the district court's dismissal of the case, holding that plaintiff Bondurant presented a justiciable controversy, and that as an "individual eligible to vote ... for the office of President" he had statutory standing under § 437h(a). Although the court found that the Athens Lumber Company was not a proper plaintiff under section 437h, it nevertheless ruled that plaintiff Bondurant could assert claims on its behalf. Rather than remanding the case to the district court for further proceedings, however, the panel itself referred eight constitutional questions adopted from appellants' pleadings to the court of appeals *en banc* (J.S. App. 23-25).[3]

On November 10, 1982, the Federal Election Commission ("Commission" or "FEC") filed a motion to remand the case to the district court, arguing that a factual record was necessary for proper decision of these issues and that 2 U.S.C. § 437h(a) authorized only the district court to certify questions to the *en banc* court of appeals. On February 7, 1983, the court ordered that the entire case be reheard *en banc*, but by a majority vote of the sitting judges under Fed. R. App. P. 35, and not under the mandatory and expedited provisions of section 437h.[4]

---

[3] In summary, the questions pose the validity of the statute's expenditure prohibition under the first amendment, the contribution prohibition under the first amendment, and both under the equal protection and vagueness doctrines of the first and fifth amendments.

[4] The court's order (App. A, *infra*) reads in relevant part:

> Based upon a vote of a majority of circuit judges in regular active service, and pursuant to our discretionary authority under Fed.R.App. P. 35, it is ORDERED that this case be considered by the Court en banc, with oral argument.

(footnote continued)

On October 24, 1983, after briefing and oral argument, the *en banc* court issued its unanimous *per curiam* decision. The court stated that the case was being heard pursuant to Rule 35 and not under 2 U.S.C. § 437h. It noted that the panel's decision had been vacated, but adopted the panel's treatment of standing. On the merits, the court stated (J.S. App. 2):

> Viewing the substantive constitutional issues as being controlled by the Court's unanimous opinion in *Federal Election Commission* v. *National Right to Work Committee, et al.*, ___ U.S. ___, 103 S. Ct. 552, 74 L. Ed.2d 364 (1982) and for the reasons there stated, we find the limitations and prohibitions of which appellants complain to be constitutional.

Appellants filed their notice of appeal on October 28, 1983, and their jurisdictional statement on January 20, 1984.

ARGUMENT

The Commission requests the Court to dismiss the appeal taken by appellants Bondurant and Athens Lumber Company for lack of jurisdiction under 2 U.S.C. § 437h. Alternatively, the Court should affirm the judgment of the United States Court of Appeals for the Eleventh Circuit as correctly decided, and not requiring further argument. Sup. Ct. R. 16.1(c). If the Court dismisses the appeal and construes the jurisdictional statement as a petition for certiorari, it should deny the petition, because the issues presented are not sufficiently important to warrant this Court's review. Sup. Ct. R. 17.1(c).

1. This case is not properly before the Court under 2 U.S.C. § 437h. Section 437h(b) only permits direct ap-

---

(footnote continued)
A notice sent to counsel with the court's order noted that the grant of a rehearing *en banc* automatically vacates the panel's opinion. *See* 11th Cir. R. 26(k).

peal to this Court from an *en banc* court of appeals decision "on a matter certified under subsection (a) of this section . . . ." Subsection (a) only provides for *en banc* consideration of constitutional questions certified to the appellate court by the district court. This Court has held that the grant of jurisdiction in 2 U.S.C. § 437h must be narrowly construed. *Bread Political Action Committee* v. *FEC*, 455 U.S. 577, 580-581 (1982). This case does not come within this Court's narrow appellate jurisdiction under 2 U.S.C. § 437h(b).

The district court in this case never certified any constitutional issues to the *en banc* court of appeals, as contemplated by 2 U.S.C. § 437h(a). Rather, it dismissed the case for lack of jurisdiction, and this decision was appealed to a panel of the court of appeals in the normal course, and not under the special procedures of 2 U.S.C. § 437h. The court of appeals panel reversed the district court's decision to dismiss the case, and itself submitted to the *en banc* court certified questions taken from appellants' district court pleadings. However, this was not adequate to invoke the court of appeals' jurisdiction under 2 U.S.C. § 437h, for that section is expressly limited to constitutional questions certified *by the district court.*[5]

Moreover, the panel's decision to submit constitutional questions to the *en banc* court was vacated by the court's order of February 7, 1983. (App. A, *infra*). When the case was reheard, the *en banc* court of appeals expressly stated that it was *not* taking the case under 2 U.S.C. § 437h, but rather under the discretionary authority of Fed. R. App. P. 35. Since the *en banc*

---

[5] It is well established that the district court's function, which includes building a complete factual record and narrowly framing the questions to reflect only those constitutional issues unavoidably presented on the record, is far from a perfunctory one. *See California Medical Association* v. *FEC*, 453 U.S. 182, 193-94 n.14 (1981) (citing cases).

court of appeals did not have jurisdiction under 2 U.S.C. § 437h(a), this Court lacks jurisdiction of the appeal under 2 U.S.C. § 437h(b). Accordingly, review of the court's decision lies only by writ of certiorari in this Court, *see* 28 U.S.C. § 1254(1); Sup. Ct. R. 17.

This Court has previously dismissed an appeal filed pursuant to 2 U.S.C. § 437h(b) in similar circumstances. *FEC* v. *Lance*, 617 F.2d 365 (5th Cir. 1980), *aff'd*, 635 F.2d 1132 (5th Cir.) (en banc), *appeal dismissed and cert. denied*, 453 U.S. 917 (1981), was a subpoena enforcement suit brought by the Commission in which Lance defensively challenged the constitutionality of § 441b(a). A court of appeals panel referred Lance's constitutional claims to the *en banc* court pursuant to § 437h, but the *en banc* court decided to hear the case under Rule 35 rather than 2 U.S.C. § 437h. *FEC* v. *Lance*, 635 F.2d at 1136-1138. Lance filed a jurisdictional statement in this Court, invoking this Court's appellate jurisdiction under § 437h(b), but the Court dismissed the appeal for want of jurisdiction, and treating the papers filed as a certiorari petition, denied certiorari. *Lance* v. *FEC*, 453 U.S. 917. *See also Gifford* v. *Tiernan*, 670 F.2d 882 (9th Cir.), *appeal dismissed and cert. denied*, 459 U.S. 804 (1982).

In sum, notwithstanding the court of appeals panel's attempt to certify constitutional questions to the *en banc* court pursuant to 2 U.S.C. § 437h(a), the *en banc* court explicitly took and decided the case under Rule 35 and not under § 437h. Since the issues in this case were not properly "certified under subsection (a)", this Court does not have appellate jurisdiction under section 437h(b).

2. The *en banc* court of appeals correctly concluded that the constitutional issues raised in this case have been settled by *FEC* v. *National Right to Work Committee*, 459 U.S. ____, 103 S. Ct. 552 (1982). Therefore,

no substantial question is presented which warrants this Court's review. Sup. Ct. R. 17.1(c).

In *NRWC*, the Court rejected first and fifth amendment challenges to a subsection of section 441b, 2 U.S.C. § 441b(b)(4)(C), which restricts expenditures of corporate funds to solicit contributions to the corporation's separate segregated fund. The Court's discussion of the constitutional issues in *NRWC* plainly establishes that appellants' first and fifth amendment challenges to section 441b lack merit.

In *NRWC*, the Court observed that, although "[t]he statutory purpose of § 441(b) . . . is to prohibit contributions or expenditures by corporations or labor organizations in connection with federal elections," the statute "permits some participation of unions and corporations in the federal electoral process by allowing them to establish and pay the administrative expenses of 'separate segregated funds, which may be 'utilized for political purposes.' 2 U.S.C. § 441b(b)(2)(C)." 103 S. Ct. at 556.[6] The Court recognized that this statutory scheme was designed to serve at least two important governmental purposes: "to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions;" and "to protect the individuals who have paid money into a corporation or union

---

[6] A separate segregated fund can be controlled by the sponsoring union or corporation, whose officials can determine how the money raised by the fund will be spent, and which candidates will be supported. "[S]uch a fund must be separate from the sponsoring union [or corporation] only in the sense that there must be a strict segregation of its monies" from the organization's other funds. *Pipefitters* v. *United States*, 407 U.S. 385, 414-417 (1972). *See also Buckley* v. *Valeo*, 424 U.S. 1, 28 n.31 (1976).

for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." 103 S. Ct. at 559. Noting that "'[t]he importance of the governmental interest in preventing [the corruption of elected officials] has never been doubted,'" the Court found that these dual purposes were sufficient to overcome the corporation's first amendment objections to the statute. *Id.*, *quoting First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 788 n.26 (1978). Finally, the Court concluded that "the statutory prohibitions and exceptions we have considered are sufficiently tailored to these purposes" to avoid unnecessary infringement of first amendment rights. 103 S. Ct. at 560.

Thus, while acknowledging that "Congress aimed a part of its regulatory scheme at corporations," the Court concluded that "[t]he statute reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," and refused to "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." 103 S. Ct. at 560.

Appellants completely ignore this Court's constitutional analysis in *NRWC*, and instead rely primarily upon minority opinions in cases decided before 1971, when the Act was amended to permit corporations to establish, maintain and control separate segregated funds. *See* 2 U.S.C. § 441b(b)(2)(C).[7] The Court in *NRWC* found that the provision for separate segregated funds permits political speech by corporations, 103

---

[7] Appellants' reliance (J.S. 14) on *Democratic Party of the United States* v. *National Conservative Political Action Committee*, ___ F. Supp. ___ (E.D. Pa. Dec. 12, 1983), *juris. st. filed* Dec. 22, 1983 (U.S. No. 83-1032) is also misplaced. That court found *NRWC* not helpful because "it dealt with corporations, a creature of positive law that has traditionally been treated as sui generis." (sl. op. at 60).

S. Ct. at 556, and appellants have made no showing that Athens or any other corporation has been prevented by the Act from making its political views known through a separate segregated fund. Thus most of appellants' argument, which is based upon the erroneous assumption that § 441b totally prohibits corporate speech relating to federal elections, is misdirected.

Appellants' other arguments were also rejected by this Court in *NRWC*. Appellants argue (J.S. 18) that small corporations present no threat of corruption, but the Court in *NRWC* concluded:

> While § 441b restricts ... corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress's judgment that it is the potential for such influence that demands regulation.

103 S. Ct. at 560. Appellants argue too that corporations are discriminated against because some large business entities are not incorporated and "incorporation is at most a neutral fact" (J.S. 18-20). Again, however, they ignore this Court's conclusion in *NRWC* that it is permissible to treat corporations differently because "the special characteristics of the corporate structure require particularly careful regulation." 103 S. Ct. at 560.

> [T]he "differing structures and purposes" of different entities "may require different forms of regulation in order to protect the integrity of the electoral process."

Id., quoting California Medical Association v. FEC, 453 U.S. 182, 201 (1981).

Finally, appellants' contention (J.S. 21-24) that § 441b's prohibition of expenditures and contributions "in connection with any election" is impermissibly vague, also runs contrary to *NRWC*. As appellants acknowledge (J.S. 4-5), Athens Lumber Company only sought to make expenditures "advocating the election

or defeat of specific candidates." Since appellants' intended expenditures are clearly within the core of § 441b's prohibition, they cannot challenge it for vagueness even if "the statute may leave room for uncertainty at the periphery...." *NRWC*, 103 S. Ct. at 561, *citing Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973) (parties within "hard core" of statute's prohibitions cannot complain of possible vagueness as applied to others).

In sum, appellants have presented no valid reasons for reconsidering this Court's unanimous decision only last term that the governmental purposes behind 2 U.S.C. § 441b are sufficiently compelling to overcome the constitutional objections raised by appellants here, notwithstanding appellants' odd suggestion (J.S. 13-14 n.2) that a unanimous decision of this Court deserves less weight because it was authored by a member of the Court who has dissented in other cases involving first amendment issues.

CONCLUSION

For the foregoing reasons, the Commission respectfully submits that this Court should dismiss the appeal for lack of jurisdiction or affirm the judgment as properly decided. Alternatively, construing the jurisdictional statement as a petition for certiorari, the Court should deny the petition.

Respectfully submitted,

CHARLES N. STEELE*
General Counsel
RICHARD B. BADER
Assistant General Counsel
JONATHAN A. BERNSTEIN
Attorney
FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4143

*Counsel of Record

FEBRUARY 22, 1984

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8102

ATHENS LUMBER COMPANY, INCORPORATED,
JOHN P. BONDURANT, PLAINTIFFS-APPELLANTS,

versus

FEDERAL ELECTION COMMISSION AND
WILLIAM F. SMITH, IN HIS OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF THE UNITED STATES,
DEFENDANTS-APPELLEES.

Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION FOR REHEARING AND PETITION
FOR REHEARING EN BANC

(Opinion October 22, 1983,
11 Cir., 198____, ____ F.2d ____)

(February 7, 1983)

Before: GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, and CLARK, Circuit Judges.

BY THE COURT:

Based upon a vote of a majority of circuit judges in regular active service, and pursuant to our discretionary authority under Fed. R. App. P. 35, it is

ORDERED that this case be consi ed by the Court en banc, with oral argument.

The clerk will set a briefing schedule. Judge Anderson is recused and did not participate in this decision.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
OFFICE OF THE CLERK

FEBRUARY 7, 1983

NORMAN E. ZOLLER
CLERK

TEL. 404 221-6187
FTS 242-6187
56 FORSYTH ST. N.W.
ATLANTA, GEORGIA 30303

TO ALL COUNSEL OF RECORD

No. 82-8102—Athens Lumber Co., et al. *v.* Federal Election Commission, et al.

Enclosed is an order this day entered by the court directing that this case be reheard en banc *with* oral argument. Under Eleventh Circuit Rule 26 the effect of granting a rehearing en banc is to vacate the previous opinion and judgment of this court and to stay the mandate.

Pursuant to this court's direction for the clerk to specify a briefing schedule for the filing of en banc briefs, *appellants* will have until *Friday, March 11, 1983*, for filing of their en banc brief, with *appellees'* en banc briefs to be filed in this office not later than *Tuesday, April 12, 1983*. All en banc briefs must be on file in the clerks office by the specified dates shown above.

All parties are requested to furnish *fifteen (15) copies of their opening briefs, record excerpts and supplemental authorities* previously filed for the use of the en banc court by no later than *Friday, March 11, 1983*.

For your information, since the court has decided to consider this case under Fed.R.App.P. 35, it may consider all issues in the case and not just the constitutional issues set out in the panel opinion. See *Federal Elec-*

tion Commission v. *Lance*, 635 F.2d 1132, at 1138 (5th Cir. 1981).

Sincerely,

NORMAN E. ZOLLER, Clerk
BY Barbara J. Champian
BARBARA J. CHAMPIAN
Deputy Clerk

/bjc—Encl.

EMMET J. BONDURANT, Esq.
JOHN B. HARRIS, JR., Esq.
BERNARD E. NAMIE, Esq.
CHARLES N. STEELE, Esq.
RICHARD B. BADER, Esq.
CAROLYN U. OLIPHANT, Esq.
JEFFREY H. BOWMAN, Esq.
CRAIG C. DONSANTO, Esq.
Hon. WILBUR D. OWENS, JR.
Mr. GIRARD WHITE HAWKINS,
Clerk, U.S. District Court
Middle District of Georgia

APPENDIX B

2 U.S.C. § 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by a corporation, national bank, or labor organizaton, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with

the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include—

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his

right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from stockholders and executive or administrative personnel of the member corporations of such trade associations and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

Office - Supreme Court, U.S.
FILED
MAR 2 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1190

In The
Supreme Court of the United States
October Term, 1983

ATHENS LUMBER COMPANY, INCORPORATED, et al.,
Appellants,

vs.

FEDERAL ELECTION COMMISSION, et al.,
Appellees.

On Appeal from the United States Court of Appeals For the Eleventh Circuit

APPELLANTS' REPLY BRIEF TO MOTION TO DISMISS OR AFFIRM

EMMET J. BONDURANT
JEFFREY O. BRAMLETT
Attorneys for Athens Lumber Company, Incorporated, et al.
BONDURANT, MILLER, HISHON & STEPHENSON
2200 First Atlanta Tower
Two Peachtree Street, N.W.
Atlanta, Georgia 30383
(404) 581-5200

March 1, 1984

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

	Pages
STATEMENT OF THE CASE	2
ARGUMENT	2
1. The district court's failure to certify this case to the *en banc* court does not defeat this Court's jurisdiction.	2
2. The *en banc* court's decision to reach the merits of this case under Fed. R. App. P. 35 does not defeat this Court's § 437h jurisdiction.	4
3. The dismissal of the appeal in *Lance* does not control this appeal.	6
CONCLUSION	7

TABLE OF AUTHORITIES

CASES

California Medical Association v. FEC, 453 U.S. 182 (1981)	4
Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)	5
FEC v. Lance, 617 F.2d 365 (5th Cir. 1980), *aff'd*, 635 F.2d 1132 (5th Cir.) (*en banc*), *appeal dismissed and cert. denied*, 453 U.S. 917 (1981)	2, 6
Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909)	5

STATUTES

2 U.S.C. § 437h	2, 3, 4, 5, 6
2 U.S.C. § 437h(a)	3
2 U.S.C. § 437h(b)	2, 5
2 U.S.C. § 437h(c)	3
2 U.S.C. § 441b(a)	2, 6

TABLE OF AUTHORITIES—Continued

	Pages
RULES	
Fed. R. App. P. 35	2, 4, 6
Sup. Ct. R. 16.5	1

No. 83-1190

In The
Supreme Court of the United States
October Term, 1983

ATHENS LUMBER COMPANY, INCORPORATED, et al.,
Appellants,

vs.

FEDERAL ELECTION COMMISSION, et al.,
Appellees.

On Appeal from the United States Court of Appeals For the Eleventh Circuit

APPELLANTS' REPLY IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

On February 22, 1984, appellee Federal Election Commission ("FEC") moved to dismiss this appeal or, in the alternative, to affirm the decision below. Appellants Athens Lumber Company, Incorporated, and John B. Bondurant submit this Reply Brief pursuant to Sup. Ct. R. 16.5 in opposition to the Motion.

STATEMENT OF THE CASE

This appeal arises from a decision on the merits by the United States Court of Appeals for the Eleventh Circuit *en banc* in an action challenging the constitutionality of a Federal Election Campaign Act ("FECA") provision brought under 2 U.S.C. § 437h. Appellants raise a facial challenge to the constitutionality of 2 U.S.C. § 441b(a), the FECA prohibition on campaign contributions and expenditures by corporations. The *en banc* court's decision on the merits is reviewable by this Court pursuant to § 437h(b).

———o———

ARGUMENT

The FEC has moved to dismiss the appeal on the curious tripartite theory that:

(1) the district court's erroneous failure to certify this case to the *en banc* court stands as an unfulfilled jurisdictional prerequisite;

(2) the *en banc* court's decision to review the constitutional questions submitted by the panel under its Fed. R. App. P. 35 discretion defeats this Court's § 437h jurisdiction; and

(3) the Court's dismissal of a § 437h appeal in *FEC v. Lance* controls this appeal.

1. The district court's failure to certify this case to the en banc court does not defeat this Court's jurisdiction.

This case was filed in July, 1981 in the United States District Court for the Middle District of Georgia under § 437h, the extraordinary provision Congress enacted to permit swift judicial review of the constitutionally controversial Federal Election Campaign Act. Section 437h(a) mandates that "[t]he district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting *en banc*." The district court failed to certify the questions raised in this case because it determined, erroneously, that the Appellants lacked Article III standing. J.S. App. C, at 48.

In October, 1982, an Eleventh Circuit panel corrected the district court's error. The panel held that appellant Bondurant was entitled to invoke the § 437h expedited review process and submitted the eight constitutional questions he raised directly to the *en banc* Court of Appeals for the Eleventh Circuit.

The panel expressly considered and rejected the pointless, time-consuming exercise of remanding this case for the formality of district court certification. J.S. App. B, at 22-23. The panel's decision was plainly influenced by a concern that the statutory mandate to expedite §437h matters "to the greatest possible extent" had already been frustrated by the lengthy delay caused by the district court's mistaken dismissal of this action. *Id.*, citing 2 U.S.C. § 437h(c).

In bypassing a remand for district court certification, the Eleventh Circuit panel properly noted that:

> [T]he facts necessary to resolve the issues raised by appellants are legislative as opposed to adjudicative. As such they are as easily presented to the court of appeals *en banc* as to the district court.
> J.S. App. B, at 22.

As the panel correctly determined, this case falls within that class of FECA cases which do not require the development of a factual record in district court because (a) the appellants challenge the statute on its face; (b) statutory interpretation cannot remove the need for a resolution of the constitutional questions; and (c) and the issues raised are neither insubstantial nor settled. *California Medical Association v. FEC,* 453 U.S. 182, 193-94 n.14 (1981).

Therefore, the district court's failure to certify the constitutional questions raised in this case has absolutely no bearing on this Court's appellate jurisdiction to review the *en banc* court's decision on the merits under § 437h.

2. The en banc court's decision to reach the merits of this case under Fed. R. App. P. 35 does not defeat this Court's § 437h jurisdiction.

Upon receiving the constitutional issues submitted by the panel, the *en banc* Court of Appeals for the Eleventh Circuit voted to hear the case pursuant to its discretion under Fed. R. App. P. 35. FEC's Motion to Dismiss, App. A, at 1a. The *en banc* court's February 7, 1983 Order undoubtedly had the effect of vacating the panel's opinion. The Order did not, however, invalidate the panel's deter-

mination that this case presented an FECA challenge properly before the Court under § 437h. In fact, the *en banc* court's subsequent decision (J.S. App. A) adopting the panel's analysis of the Article III standing issue and deciding the constitutional issues on the merits confirms the panel's determination that this is a proper §437h case.

This action was filed by a registered voter within the special class of litigants eligible to bring § 437h actions. The *en banc* court reviewed and confirmed his Article III standing and adjudicated his constitutional claims *on the merits*. Thus, the *en banc* court's Rule 35 disclaimer aside, it is plain that this case was entitled to expedited review under § 437h by the Court of Appeals sitting *en banc*. It is equally plain that the decision below ruling on the appellants' constitutional challenge is now properly before this Court on appeal under § 437h(b).

When a federal court is confronted with an Article III case or controversy brought under a statute expressly conferring jurisdiction, an affirmative obligation arises to discharge the judicial function and resolve the dispute. *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909). Chief Justice Marshall described the Court's role in this fashion:

> We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do, is to exercise our best judgment, and conscientiously to perform our duty. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

In this case, the Court's duty should be discharged by noting jurisdiction and hearing the appeal.

3. The dismissal of the appeal in Lance does not control this appeal.

FEC v. Lance, 453 U.S. 917 (1981), does not control this appeal because of a critical factual distinction. In *Lance,* the constitutional challenge to § 441b(a) arose in an FEC subpoena enforcement action brought to compel Mr. Lance's attendance at a deposition and document production. The procedural posture in *Lance* corresponded to this case to the extent that the *en banc* court reviewed the FECA issue on submission from a circuit panel under Rule 35 discretion rather than § 437h jurisdiction.

In *Lance,* however, during the six month interval between the *en banc* court's decision and this Court's dismissal of the appeal, Mr. Lance submitted to deposition because he was denied a stay of the order enforcing the subpoena. When Mr. Lance complied with the subpoena, his challenge to the constitutionality of the statute under which the subpoena issued was arguably mooted.

Thus, in *Lance,* an intervening termination of the controversy over subpoena enforcement may have defeated jurisdiction. Here, the controversy remains vibrant and there is no intervening development undercutting the jurisdictional duty imposed by § 437h.

CONCLUSION

For the foregoing reasons, this appeal is properly before the Court under § 437h and the FEC's Motion to Dismiss or Affirm should be denied.

EMMET J. BONDURANT

JEFFREY O. BRAMLETT

OF COUNSEL:

BONDURANT, MILLER, HISHON & STEPHENSON
2200 First Atlanta Tower
Two Peachtree Street, N.W.
Atlanta, Georgia 30383
(404) 581-5200

Attorneys for Appellants
Athens Lumber Company, Incorporated
and John P. Bondurant